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ABSTRACT

Education for rural Alaska Natives has come along a lengthy and tortuous path. Today the much criticized tripartite system remains in which the Federal, state and local governments deliver educational services. A new state law, S.B. 35, which attempts to decentralize control, raises some serious legal problems because of its inconsistency with Alaska's local government mandate. Municipal school districts remain a separate and parallel delivery system. The Bureau of Indian Affairs (BIA) schools, a third parallel system, independent of state authorities, continue to meet Alaska's long-standing commitment to provide education to all children. This paper reviews the laws which have shaped Alaska's education systems, discusses how those which now are in force operate in rural Alaska, and comments on the most important of the currently applicable laws. Topics are the evolution of Alaska's parallel education systems--pre-statehood, statehood and the Alaska Constitution, the state foundation program; Federal financial assistance programs--Impact Aid (P.L. 874), Impact Aid (Construction) - P.L. 815, Johnson-O'Malley Act, Elementary and Secondary Education Act, Indian Education Act of 1972, Indian Self-Determination and Education Assistance Act; localizing education and its control--opposition to boarding programs, the "Hootch" litigation, the North Slope Borough, legislative reform of state-operated schools, decentralization under S.B. 35; community control and S.B. 35 as a Constitutional clash; and the uncertain role of the BIA. (NQ)

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Law and Alaska Native Education

David H. Getches

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Law and Alaska Native Education

The Influence of Federal and State Legislation upon Education of Rural Alaska Natives

by

David H. Getches

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Table of Contents

Chapter		Page
	About the Author	v
	Acknowledgments	vii
	Introduction	1
I	History: Evolution of Alaska's Parallel Systems of Education	3
	A. Pre-Statehood	3
	B. Statehood and the Alaska Constitution	7
	C. The State Foundation Program	9
II	Federal Programs of Financial Assistance	11
	A. Impact Aid—P.L. 874	11
	B. Impact Aid (Construction)—P.L. 815	12
	C. Johnson O'Malley Act	13
	D. ESEA Title I	17
	E. ESEA—Other Titles	18
	F. Indian Education Act of 1972	18
	G. Indian Self-Determination and Education Assistance Act	19
III	Localizing Education and Its Control	21
	A. Growing Opposition to Boarding Programs	21
	B. The *Hootch* Litigation	23
	C. The North Slope Borough	26
	D. Legislative Reform of State-Operated Schools	27
	E. Decentralizing Under S.B. 35	29
IV	Surviving the Cures: Prognosis	31
	A. Community Control: Too Much of It?	31
	B. S.B. 35—A Constitutional Clash	32
	C. The Uncertain Role of the BIA	34
V	Conclusion	39

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A Primer on Laws Important to Alaska Native Education, Fairbanks: University of Alaska, Center for Northern Educational Research, December 1976;

"The North Slope Borough, Oil, and the Future of Alaska," 3 UCLA-Alaska L. Rev. 55 (1973);

"Difficult Beginnings for Indian Legal Services," 30 NLADA Briefcase 181 (1972);

"Lawyers and Indians," The Colorado Lawyer, February 1972;

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"Special Treatment of Cemeteries," 40 So. Cal. L. Rev. 716 (1967);

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p. iv blank

5

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p. vi blank

Introduction

Rural Alaska is in an era of change in the education of its Native population. The state's unique physical environment and cultural characteristics of the rural population have presented special challenges to educators. Efforts of lawmakers to respond have had mixed results. Recently enacted laws hold some promise of dealing better with the problems than past attempts have, but solutions are far from complete.

The state includes a landmass about one fifth that of all the contiguous states. Problems of temperature extremes, small concentrations of population, rugged terrain, and distance exist nowhere else in the nation as they do in Alaska. Communication, transportation, and housing difficulties make education costlier and harder to administer. The strikingly different culture and economy of "bush" Alaska creates further complications. Isolated communities have survived in an inhospitable wilderness for centuries by heavy reliance on the animals, fish, and birds they hunted or vegetable resources they gathered in subsistence activities. In the past, a cash economy was superfluous to this survival-oriented society and only recently has begun to develop in most rural villages. Cultural values and practices in the bush differ tremendously from those of the rest of the United States and the western world.

Education must walk a fine line if it is to be nondestructive of the Native culture while still meeting the needs to develop basic skills and prepare the next generation of Native Alaskans for their inevitable contacts and dealings with the western world. School systems developed for the physical circumstances, cultural values, and economic needs of the continental United States simply have not been transplanted successfully to rural Alaska. Early concerns with developing a system of education to reach rural communities have changed to a current concern for the right system. The most notable change in approach has been involvement of Native people in the process.

Lawmakers have grappled ineptly with rural Alaska's education problems. Some very recent developments hold out hope for improvements, but ignore some lessons of the past and leave unrectified some of the accidents of the past. For instance, an anomalous, much criticized tripartite system remains in which three distinct governments—federal, state, and local—deliver educational services. A new state law, "S.B. 35," commands abrupt shifts in decision making from a centrally based state agency to regional boards. Proponents of "local control" of education are heartened, but the law stops short of the measure of autonomy embodied in the state's constitution and statutes for delivery of education through municipal governments. Municipal school districts remain a separate and parallel delivery system, the use of which has not been fully developed in the bush. Alaska's long-standing commitment to provide education to all children of the state continues to be met only by the presence of a third parallel system, independent of state authorities—the Bureau of Indian Affairs (BIA) schools.

This paper reviews the laws which have shaped Alaska's education systems and discusses how those which now are in force operate in rural Alaska.[1] The most important of the currently applicable laws are commented upon. It is hoped that a better understanding of the mechanisms which exist for educating Native children of rural Alaska will be promoted and that weakness in the legal structure underlying those mechanisms can be identified by administrators, policy makers, and legislators.

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1. An important part of rural education in Alaska concerns the military "on-base" schools. This paper focuses on Native education and does not discuss the "on-base" schools because their use in military enclaves has little effect on Native children.

Chapter I

History: Evolution of Alaska's Parallel Systems of Education

A. Pre-Statehood

When the United States purchased Alaska from Russia in 1867,[2] there were over 50 Russian-supported schools functioning.[3] Most were provided by the Russian Orthodox Church. Russian schools gradually closed after the American purchase; there were 17 in 1887, eight in 1896, and the last one closed in 1916.[4]

The period between 1867 and 1884 was one of near total neglect of Alaska education by the United States.[5] The few schools that functioned in Alaska during this time were mostly those of religious missionaries. The Presbyterian Church had mission schools for Indians at Sitka, Wrangell, and other places in Southeastern Alaska. The Russian Orthodox Church maintained educational programs in the Aleutian Islands, Southwestern Alaska, and Sitka. And schools for Native children on the Pribilof Islands were maintained by the Alaska Commercial Company.[6] It took many years to bring education back to the level at which it existed under the Russians.

Attempts were made to get the federal government to address the need for education in Alaska, but official reports reiterate the lack of success of such attempts.[7] Recognizing an apparent lack of government interest in education, residents of Sitka, then the largest and most important city in Alaska, organized a city government and began their own school. It died out after only six years, however.[8]

In 1884, Congress passed Alaska's Organic Act.[9] The act established civil government in the territory, which had been without any civil law or devices for dispute resolution since the American purchase. Provision for education of children also was made. Under the act the Secretary of the Interior was charged with making "needful and proper provision for the education of the children of school age in the Territory of Alaska, without reference to race, until such time as permanent provision shall be made for the same. . . ."[10] Although the act was temporary by its terms, Congress did not for many years legislate a mechanism for establishing schools other than those directly under the Secretary's control. In the meantime, the Secretary used his authority and annual appropriations to establish some schools, mostly by entering into contracts with churches and missionary societies. By this method a Moravian school was established at Bethel and schools were operated in the Yukon and Nushagak Valleys, Point Barrow, Point Hope, and Cape Prince of Wales. In addition, the government took over the operation of four existing Presbyterian schools and established new schools at Juneau, Sitka, and Unalaska.[11]

Alliances between the government and the mission schools were facilitated through an official responsible for much of the missionary work of the Presbyterian Church, Dr. Sheldon Jackson, who was appointed General Agent for Education in the territory.[12] Jackson was a controversial figure in Alaska.[13] He led a long and untiring fight for congressional attention to Alaska's education problems and remained active in Alaskan education for many years.[14]

Once the government agreed to pay a monthly tuition for Native children, contracting mission schools were especially tenacious of their students, even though there was no compulsory attendance law. An early case demonstrates the point. An Indian woman had orally agreed in 1883 to entrust her five-year-old child to the Presbyterian mission school in Sitka. Later the mission contracted with the

2. Treaty with Russia concerning the Cession of the Russian Possessions in North America, March 30, 1867, 15 Stat. 539.

3. H. Chevigny, Russian America: The Great Alaska Venture, 1741-1867 at 247 (1965).

4. W. Marsh, Alaska Department of Education, North to the Future 9, (hereinafter cited as North to the Future).

5. The governor of Alaska, A. Swinford, reported in 1887:

> It is a noticeable fact, in my opinion not altogether creditable to us, that the despotic government of Russia expends annually more money for the education and Christianization of the Native people of Alaska than does the professedly more free liberal, and enlightened, one to whose care and protection they were transferred twenty years ago.

Report of the Governor of Alaska to the Secretary of the Interior, 1888, 984.

6. C. Ray, Alaska Native Education—an Historical Perspective, Alaska Native Needs Assessment Part II, *Bureau of Indian Affairs, Office of Indian Education Programs, Research and Evaluation Report Series No. 18* at 1 (Albuquerque, n.d.) (hereinafter cited as Ray).

7. Report of the United States Commissioner of Education, 1881 at 451.

8. "Report on Education in Alaska 1886," S. Doc. No. 85, 49th Cong., 1st Sess. 20-21 (1886).

9. Act of May 17, 1884, c. 53, 23 Stat. 24.

10. *Id.* at 27-28.

11. North to the Future, *supra* at 17.

12. T. Hopkins, *The Federal Government as Agent of Cross-Cultural Education in Alaska*, in Education in the North (Darnell, ed.) at 56 (1972).

13. Compare J. Lazell, Alaskan Apostle, the Life Story of Sheldon Jackson 9 (1960) with J. Nichols, Alaska, A History of Its Administration, Exploitation, and Industrial Development During Its First Half Century Under the Rule of the United States 103-04, 167, 195 (1923).

14. The impressive accomplishments of Sheldon Jackson are chronicled in F. Darnell, Alaska's Dual Federal-State School System: A History and Descriptive Analysis, unpublished dissertation, 1970, (University of Alaska Library) 160-70 (hereinafter cited as *Darnell*).

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government to teach Indian children for $11.25 a month. In 1886 the mother attempted to get her child back, but the mission superintendent would not let her have the child. She sought a writ of habeas corpus in federal court, but it was denied and the oral relinquishment of the child was held to be binding and irrevocable. The court stated that "when sound morals, the good order and protection of civilized society demand it, the court has no alternative."[15]

Beginning in 1896, Congress showed a growing disposition away from use of denominational schools to educate Indians. In that year the Department of Interior Appropriations Act stated that it was the policy of the government to make no appropriation for Indian education in sectarian schools. A proviso was included to allow the Secretary to contract with such schools during 1897, but only where "nonsectarian schools can not be provided." No more than 50 percent of the 1895 contract amount could be so used.[16] The next year's appropriation contained identical language and extended contracting authority another year, but at a rate of no more than 40 percent of the 1895 amount.[17] The policy led to the phasing out of contract arrangements with mission schools.

A 1900 Act of Congress permitted communities having a population of 300 or more to incorporate as towns and to elect their own school boards to assume control of public school boards within them.[18] This was in response to non-Native population growth during the gold rush. Many people felt that the federal funds being provided for education were inadequate. The effect of the act was of limited scope because so few communities were large enough to qualify.[19] Those that did had rather generous budgets compared to the amounts available for federal schools.[20] It is significant, however, that the school board was given "exclusive supervision, management and control," and was funded directly by 50 percent of license fees paid under an earlier act [21] by residents and by persons and corporations for business carried on within the town.[22]

In 1905, Congress dealt more comprehensively with the question of education in Alaska with passage of the Nelson Act.[23] The act made the territorial governor ex officio superintendent of public instruction, required establishment of public school districts in incorporated towns, and made provision for establishing school districts outside towns.[24] The 1900 Act had only permitted establishing schools. The Nelson Act said the town councils not only had power but it would "be their duty, in their respective towns to establish school districts, to provide the same with suitable schoolhouses, and to maintain public schools therein and to provide the necessary funds for the schools."[25] Once established, the schools were to be under the control of an elected board with power to employ teachers, maintain the school, and expend funds, except for construction and land, which was the prerogative of the town council. The act also allowed 12 or more adult citizens outside incorporated towns to petition the clerk of the U.S. district court to establish "a school district at any camp, village, or settlement." In order for the clerk to grant the petition there had to be at least "twenty resident white children between the ages of six and 20 years" in an area of no more than 40 square miles.[26] After being appointed initially, the district board was elected and had power to do everything necessary to run and maintain the school. Funds were made available to the districts by the governor but continued to be derived from one half of the business license fees collected in the incorporated areas. Once a Nelson Act school was created in a location, the federal Bureau of Education within the Interior Department was relieved of its responsibility there.

The schools set up under the Nelson Act were not for Alaska Natives. Section 7 stated:

> That the schools specified and provided for this act shall be devoted to the education of white children and children of mixed blood who lead a civilized life. The education of the Eskimos and Indians in the district of Alaska shall remain under the direction and control of the Secretary of the Interior . . . .[27]

The segregated nature of district schools apparently was firmly maintained for a while. It seems to have been grounded in a concern for racial and ethnic integrity rather than for the fiscal reason. Less than a year after the effective date of the Nelson Act six "mixed blood" children in Sitka sought and were

15. In re Can-ah-couqua, 29 F. 687, 690 (D. Alaska 1887).

16. Act of June 10, 1896, c. 398, § 1, 29 Stat. 345. For a discussion of the propriety of using Indian trust funds for sectarian schools, see Quick Bear v. Leupp, 210 U.S. 50 (1908).

17. Act of June 7, 1897, c. 3, § 1, 30 Stat. 79. The policy was restated in the 1917 Appropriations Act (Act of Mar. 2, 1917, c. 146, § 21, 39 Stat. 988) and was codified at 25 U.S.C. § 278. In 1968, the act was repealed and replaced with an act allowing use of Interior funds for education of Indians in sectarian vocational, technical and higher education institutions. 25 U.S.C. § 278a.

18. Act of June 6, 1900, c. 786, § 201-03, 31 Stat. 321, 521, *as amended*, 31 Stat. 1438.

19. Prior to 1905, only nine had incorporated under the act. (Juneau and Skagway in 1900; Ketchikan and Treadwell in 1901; Nome in 1902; Douglas, Eagle, Wrangell, and Valdez in 1903.) North to the Future, *supra* at 20.

20. Towns could receive $15,000 a year for support of schools. The total available to towns equalled the amount appropriated for the rest of Alaska. *Id.*

21. Act of Mar. 3, 1899, c. 429, § 460, 30 Stat. 1336.

22. 31 Stat. at 521, *as amended*, 31 Stat. 1438. The amendment set aside license fees paid for doing business outside towns for the Secretary of the Interior to spend for school purposes in those areas.

23. Act of Jan. 27, 1905, c. 277, 33 Stat. 616.

24. *Id.* at 617.

25. *Id.*

26. *Id.* at 618.

27. *Id.* at 619.

denied admission to the Sitka public school. They then sued the district, asking the court to order them admitted as "civilized" mixed bloods.[28] The record showed nothing about the children that would create problems for the school, such as poor behavior or ill health. Their families were responsible people who participated in community life. However, the court seemed to attach great weight to the fact that the children lived in the Sitka Indian village and associated with others there. The court developed a test of what constituted the "civilized life":

> [W]hether or not the persons in question have turned aside from old associations, former habits of life, and easier modes of existence; in other words have exchanged the old barbaric, uncivilized environment for one changed, new, and so different as to indicate an advanced and improved condition of mind, which desires and reaches out for something altogether distinct from and unlike the old life.[29]

In rejecting the children's plea, the court considered that "[c]ivilization . . . includes . . . more than a prosperous business, a trade, a house, white man's clothes and membership in a church."[30] In 1912, Alaska was officially denominated a territory by Congress.[31] Although the act gave Alaska a legislature, its powers were severely limited, specifically with respect to education.[32] As if to spite Congress in protest for its stinginess with legislative powers, the territorial legislature enacted a uniform school act purporting to establish a school system throughout the state to assume education functions for all but Alaska Natives.[33] The act provided for a territorial board of education, a superintendent, and a means of financing schools earmarking a percentage of the territorial tax revenues for schools.[34]

While the attempt at legislating a school system for Alaska was ultra vires under the act establishing the legislature, it was a potent expression of the determination of Alaskans to assume greater control of their own affairs, especially those related to education. It is not clear that either the futile attempts of the Alaska Territorial Legislature to override Congressional restrictions or memorials respectfully asking for responsibility for education[35] actually motivated actions ultimately taken by Congress, however.

By the act of March 3, 1917, Congress empowered the territorial legislature "to establish and maintain schools for white and colored children and children of mixed blood who lead a civilized life."[36] Scattered school districts and attenuated responsibilities for education became unified under the territorial government—at least as to the education of non-Native students. The incorporated school districts kept much of their local control but became subject to a territorial department of education. Appropriations for schools were made by the legislature from territorial funds. The legislature took over from the Congress and the U.S. Bureau of Education the functions of establishing new schools and continuing old ones. The federal government remained solely responsible for Native education.

It seems that the primary impetus for the 1917 Act was another act the same year which effected prohibition in Alaska.[37] Because a major part of the budgets for Nelson Act schools had been from saloon licenses, revenues dried up along with the territory. An alternative for education funding had to be found and the shift to territorial responsibility was the answer.

Whether Congress would have bowed to Alaskan urgings for greater control of education in absence of the financial problems caused by prohibition is uncertain. Nevertheless, some control of education shifted to Alaska. The prematurely enacted Uniform School Act was lawfully reenacted in a modified form in 1917 by the territorial legislature.[38] With its enactment, the dual federal territorial school system began, continuing the racial segregation provided for in the bifurcated federal system under the Nelson Act.

Any lingering confusion over what would qualify a mixed-blood Native child as leading "a civilized life," entitling him or her to attend territorial schools should have been eliminated by the 1924 Citizenship Act[39] making Indians, including Alaska Natives, citizens. The Treaty of Cession from Russia[40] required the United States to naturalize all persons who remained in the territory, "with the exception of the uncivilized tribes." If the argument that "citizenship is tantamount to 'civilization,' "[41] were accepted, the only impediment to mixed bloods who wanted to enter territorial schools was removed. The education of Natives other than mixed bloods would still be under the federal government.

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28. Davis v. Sitka School Board, 3 Alaska 481 (1908). It is interesting that counsel for the children was one William A. Kelly, who had been the superintendent of the Sitka Presbyterian Mission School against whom the habeas corpus proceeding in *In re Can-ah-couqua, supra,* was brought. For a period Kelly was Sitka District Superintendent for the Territorial Schools, also. North to the Future, *supra* at 18. The court indicated that efforts to gain admission to the school for the children in *Davis* "were not so much . . . those of the parents but those of Mr. Kelly" who had become interested because of his "peculiar field of labor among the native Alaskans." 3 Alaska at 489.
29. 3 Alaska at 488.
30. 3 Alaska at 491.
31. Act of Aug. 24, 1912, c. 387, 37 Stat. 512.
32. *Id.*
33. Ch. 74, [1915] Sess. Laws of Alaska, § 1.
34. *Id.* at § 2-29.
35. H. J. Memorial No. 12, Compiled Laws of Alaska, 1915 at 233-34 (1915).
36. Act of Mar. 3, 1917, c. 167, 41 Stat. 1131.
37. Act of Feb. 14, 1917, c. 53, 39 Stat. 903.
38. Ch. 64, [1917] Sess. Laws of Alaska.
39. 8 U.S.C. § 1401 (a)(2).
40. Treaty with Russia concerning the Cession of Russian Lands in North America, March 30, 1867, 15 Stat. 539.
41. *Cf.* United States v. Lynch, 7 Alaska 568, 572 (1927).

Alaska's racially segregated school system continued for many years as it was required to by law. However, strict racial barriers began to give way to practicality. Rather than insisting upon costly duplication of facilities in small villages, territorial schools often admitted Natives. Similarly, under rules applicable to federally run Native schools, the few whites who resided in almost totally Native villages were admitted when no territorial school was available.[42] Deference to practicality was not universal, however, and dual, racially segregated facilities persisted in many places.[43] A general belief that "the highest good of both races [required] separate schools" predominated.[44]

Acceptance of Native students in territorial schools remained difficult for many years. In 1926 a part Indian challenged as racially discriminatory an announced policy of admitting no children of Indian blood to the public school in Sitka. Prevailing law at the time found separate schools for children of different races to be constitutionally acceptable so long as they were on an equal plane with those maintained for the white race.[45] Accordingly, the school district claimed that the child's education was provided for in other schools maintained for Indians by the Secretary of the Interior. The court said that it could not determine whether the child was a full-blood Indian as contemplated by the Nelson Act and whether the Secretary did in fact maintain a school which was on an equal plane with territorial schools. Thus in Sing v. Sitka School Board, no decision was reached, but it was suggested that exclusion of the child from school if both of these conditions were not shown would be improper.[46]

The right of part Indians to attend public school was bolstered by a court decision two years later. In Jones v. Ellis it was held that the right of mixed-blood children to attend the territorial schools in Ketchikan was equivalent to that of white children, so that the plaintiff could not be excluded to eliminate overcrowding simply because she was a mixed blood and had the alternative of attending the Indian school.[47] The fact that the district had chosen to retain four non-Native students who lived outside the district, but for whom it received tuition payments pursuant to an act of the territorial legislature,[48] indicated the motive may not have been based entirely upon racial concerns.

To ease the financial problem and to help eliminate duplication of school facilities which existed in areas such as Sitka and Ketchikan where the Sing and Jones cases arose, Congress in 1930 authorized the Secretary to contract with school boards to educate "non-taxpaying Natives including those of mixed Native and white blood."[49] The act allowed payments up to the total cost of operating a separate Native school in the particular town and permitted the Secretary to lease government buildings to contracting school boards. This act should have been a significant step toward eliminating racial barriers. In many towns Natives were included in territorial schools, but funding was not sufficient to satisfy territorial officials and arrangements were made to transfer territorial schools with all Native enrollments to the Bureau of Indian Affairs.[50]

The territorial legislature increased funding of schools under its jurisdiction in 1930, agreeing to provide between 70 and 80 percent of the costs (smaller schools received a larger percentage than larger schools).[51]

The practice of federal contracting with territorial schools for Native education responded to the consensus of observers that the separate school systems made little sense educationally or financially. Progress was slow, however, and it was many years before management of a significant number of federal schools was shifted to the territory.[52] Between 1942 and 1949, however, some 19 schools were so transferred.[53] Federal officials had become concerned that their resources ought to be devoted to expanding services to communities with no schools. Duplication of facilities in several places was eliminated, freeing federal dollars to address unmet needs. Nevertheless, in 1950 there were 93 federal day schools and three boarding schools; and 30-40 communities and 1,800 children were still without any facilities at all.[54]

A material inducement for territorial assumption of responsibility for educating Native children was the Johnson O'Malley Act of 1934.[55] A primary motivation for the act was an intent to provide a

42. *Report of the Alaska Commissioner of Education, 1920*, 54 (1920). See 25 *U.S.C.* § 288 and 289 (1970) permitting enrollment of whites in Indian schools.

43. As late as 1930 at least 19 communities, many of them small villages, had separate, federally run Native schools and territorial schools. *Dept. of the Interior, Annual Report of the Governor of Alaska to the Secretary of the Interior for Fiscal Year ended June 30, 1930*, 83, 86.

44. *Report of the Alaska Commissioner of Education, 1920*, 55 (1920).

45. Plessy v. Ferguson, 163 U.S. 537, 544 (1896) (dicta).

46. 7 Alaska 616, 624-25 (1927).

47. 8 Alaska 146 (1929). The holding was expanded upon in a 1943 opinion of the territorial attorney general which ruled that Native children could not be compelled to attend a Native school if there was a territorial school in the same community. 1943 Op. Alaska Atty. Gen. No. 38271-1943-803.

48. Ch. 95, [1929] Sess. Laws of Alaska.

49. Act of May 14, 1930, ch. 273, 46 Stat. 279, 321.

50. *Report of the Alaska Commissioner of Education, 1935*, 40.

51. Ch. 119, [1931] Sess. Laws of Alaska.

52. For a comprehensive review of prestatehood proposals and policies concerning transfer of federal education functions from the BIA to the territory see Darnell, *supra* at 206-29.

53. Ray, *supra* (Appendix A) at 29. This is the same number of schools which had been transferred in the 1930's from the territory to the BIA because they were all Native schools. *Report of the Commissioner of Education, 1935*, 40.

54. *Id.* at 6, 27-28.

55. 25 U.S.C. § 452 (1970) (Act of April 16, 1934, c. 147, § 1, 48 Stat. 596, *as amended* 49 Stat. 1458).

means for transferring the education of Indian children from the federal government to state and local school systems.[56] The Secretary of the Interior was authorized to contract with states and territories, and later, political subdivisions, public and private institutions, and corporations,[57] for the education of Indians. Appropriations under the act were meager at first and contracts few. Although the legislature promptly authorized the Territorial Board of Administration to enter into contracts with the Secretary of the Interior [58] so that the territory could take advantage of the act, the first Johnson O'Malley contract was not entered into in Alaska until 1952.[59]

A statement of Bureau of Indian Affairs policy in 1950 recommended use of Johnson O'Malley contracts to facilitate transfers of schools to the territory by providing support for the schools.[60] Which schools were to be transferred and when depended upon whether "Indians are ready" and whether "satisfactory arrangements" could be made with the territory.[61]

Readiness was apparently a condition that depended upon a determination by federal officials as to whether the transfer would be of "advantage to the Natives and with their concurrence."[62]

Between 1951 and 1954, 27 more schools were transferred from federal to territorial control.[63] Then transfers were virtually halted until well after statehood because of the territory's anxiety over the costs involved.[64] A detailed analysis of projected costs and revenues for education in 1954 revealed that there were inadequate resources to continue takeovers of federal schools without "complete and continuing financial support [being] made available solely from federal sources."[65] This did not mesh with the Bureau of Indian Affairs' desire for phasing out its financial responsibility for schools no longer operated by it. Territorial officials long had maintained that the federal government was responsible for educating Indian and Eskimo children.[66] And until statehood and the adoption of the Alaska Constitution they were correct as a matter of law.

B. Statehood and the Alaska Constitution

A constitutional convention called pursuant to an act of the Alaska Territorial Legislature[67] agreed on a constitution for the State of Alaska on February 5, 1956. The constitution was approved by the voters of Alaska on April 24 and became operative January 3, 1959,[68] after passage of the Statehood Act by Congress and proclamation by the president. The constitution included a strong statement committing the state to full responsibility for the education of all children:

> The legislature shall by general law establish and maintain a system of public schools open to all children of the State .... [69]

This replaced the permissive language of the 1917 act which "empowered" the territorial legislature to establish schools with mandatory language requiring the legislature to establish a public school system.

The Alaska Supreme Court has called the new provision a "constitutional mandate for pervasive state authority in the field of education."[70] The phrase "open to all children of the State," "guarantees all children of Alaska a right to public education."[71] The unequivocal words in the constitution theoretically should have ended the dichotomy between schools for "white and colored children and children of mixed blood who lead a civilized life" on one hand, and Native children on the other. In practice the dual system continues today.

Notwithstanding the mandate in the new constitution, there was no major change in statutory law or in practice relative to rural education for several years after statehood. Most of the territorial school laws remained in effect, including a definition of "public schools" which excluded "schools for Alaska Natives under the control of the federal government and administered and supervised through the Bureau of Indian Affairs."[72] An act creating nine boroughs with local education functions[73] resulted in merger of district schools and state-operated rural schools with-

56. NAACP Legal Defense and Educational Fund, An Even Chance 11-12 (1971) (hereinafter cited as An Even Chance). There was also concern that the presence of nontaxable Indian land within school districts should be compensated with federal aid. In that sense, Johnson O'Malley continued a policy begun in 1914, which allowed for tuition payments for Indian children in Public schools. Act of Aug. 1, 1914, c. 222, 38 Stat. 582. The Alaskan situation did not fit well the in-lieu-of-taxes purpose of the tuition program or the regulations under it, however, because of the absence of property taxes and the fact that Native lands were not "trust lands" with title held by the government as were Indian lands in the states. *See generally* National Indian Education Association, Study of Title II of P.L. 93-638, prepared for the Bureau of Indian Affairs, 11-68 (1975) (hereinafter cited Study of Title II) for a comprehensive legislative history of the Johnson O'Malley Act.

57. Amendment added by Act of April 16, 1934, c. 147, 48 Stat. 596.

58. Ch. 85, [1935] Sess. Laws of Alaska.

59. Study of Title II, *supra* at 192.

60. Ray, *supra* (Appendix A) at 43.

61. *Id.*

62. *Id.* at 42.

63. *Id.* at 7.

64. *Id.* at 8. Only two schools were transferred from federal control between 1954 and 1967. (Tanana in 1958; Circle in 1959.)

65. *Id.* (Appendix D) at 76.

66. D. Dafoe, *Some Problems of Education of Native Peoples in Alaska*, 36 (1959).

67. Ch. 67, [1955] Sess. Laws of Alaska.

68. Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339.

69. Alaska Const. art VII, § 1.

70. Macauley v. Hildebrand, 491 P. 2d 120, 122 (Alaska, 1971).

71. Breese v. Smith, 501 P. 2d 159, 167 (Alaska, 1972).

72. *Alaska Stat.* § 14.6010(1) (1975), formerly A.C.L.A. § 37-1-3 (1949).

73. *Alaska Stat.* § 07.10.100—07.20.100 (1963).

in the boroughs into the borough system.[74] But there was no move toward consolidation of the dual state and federal systems for several years notwithstanding a need, generally acknowledged by educators, for merging rural schools under a state system.[75] It was widely understood that there would be no sudden state assumption of responsibility for federal schools in conformity with the requirements of the state constitution. Obedience to the constitution would have been a financial impossibility.

The first test of the state-federal relationship came after the issuance of bonds to build a new vocational school in 1960. The state, having no funds to operate the school which would be attended largely by Native students, asked the Bureau of Indian Affairs to pay for operations. But BIA was hesitant to do so because it had been left out of most of the planning and considered it essentially a state project. The questions raised by this incident about responsibility for planning and financing rural (i.e., primarily Native) education precipitated a meeting in Washington, D.C. between federal and state officials on March 1, 1962.[76]

The Washington meeting resulted in a Memorandum of General Agreement between state and BIA officials.[77] The document stated an understanding that the state had primary responsibility for education of all children and that all schools in the state would be included in a single state system, but that because of the state's financial limitations, "Federal financial participation will remain essential for some time." There was mutual agreement that the state, aided by the federal government, should develop "with local participation" an overall education plan for transferring BIA-operated schools to state management and operation.[78] The Bureau's statement of intent carefully avoided a commitment either to continuing to operate schools or to turning them over to the state on any fixed schedule and merely pledged to "operate its schools or otherwise fulfill the commitments to the education of Alaskan Natives" consistent with the state education policy. The supplementary nature of BIA education activities was noted.

While the Statehood Act presumably relieved the Secretary of the Interior of the responsibility of educating Alaskans (which originated with the Organic Act[79] and was narrowed by other legislation to a duty only to educate Natives),[80] he still had, and continues to have, authority to spend monies appropriated for Indian education in Alaska under the general act charging him with the duty of expending funds for education of Indians and other purposes.[81] The strain which existing schools placed on the new state's budget precluded any real progress toward the goal of turning control of BIA schools over to the state. In order to meet serious needs to keep pace with increasing demands and to improve educational quality, BIA budgets and personnel for Alaska continued to increase, supported by annual congressional appropriations.

The greater ability of the state to shoulder financial burdens in education led to further transfer of BIA schools in 1967. Between 1967 and 1970, 28 schools were so transferred.[82] Since then transfers have slowed; 44 day schools and one boarding school continue to be operated by BIA.[83] During the time transfers were being made, BIA was attempting to improve teacher-student ratios by adding new teachers and aides and upgrading physical facilities. Also the BIA has made efforts to increase local parent involvement in the schools through establishing advisory school boards and has attempted to address the need for more high schools. The BIA has been committed to making its system compatible with the developing statewide education policy.

Ultimate responsibility for education in Alaska resides in the state legislature under the constitution. But the drafters of the document clearly intended that eventual control would be in municipalities. A preference for maximum local self-government was expressed in the constitution,[84] and a unique system of local government was created by its provisions.[85] The constitutional convention was aware of many problems experienced by local governments elsewhere, such as the dissipation of local control and uncoordinated taxing power which occur when there are numerous, municipal governments providing special services and having boundaries which overlap with counties, cities, and each other. The delegates to the convention believed that a single system of municipal government with maximum sovereignty at the local level was desirable. Further, they knew that the system had to be flexible enough to fit the radically different local situations of their vast state-to-be and to adjust to changes which would be wrought by time in a rapidly growing place.[86]

The Alaska Constitution embodied a strongly stated preference for dividing the state into local governments according to criteria which would reflect logically the broad functions and powers to be exer-

74. *Report of the Alaska Commissioner of Education, 1965*, 2.
75. Darnell, *supra* at 239.
76. Ray, *supra* at 8-9.
77. *Id.* (Appendix C) at 106-07.
78. *Id.* at 106.
79. Act of May 17, 1884, c. 53, 23. Stat. 27-28.
80. Act of Jan. 27, 1905, c. 277, 33 Stat. 619, Act of Mar. 3, 1917, c. 167, 41 Stat. 1131.
81. 25 U.S.C. § 13 (1970). It is clear that legislation and administration of programs for the benefit of Indians does not offend constitutional safeguards against racial classification. *E.g.*, Morton v. Mancari, 417 U.S. 535, 553 (1974).
82. Ray, *supra* (Appendix K) at 176.
83. Alaska Department of Education, 1975-76 Mini-Directory 29 (Feb. 1976).
84. Alaska Const. art. X, § 1.
85. Alaska Const. art. X, § 2-12.
86. Alaska Constitutional Convention, Minutes of the Committee on Local Government 1-3 (1955-56).

cised and the ability of the constituents to act for their common interests. Article X, section 3 of the constitution states:

> The entire State shall be divided into boroughs, organized or unorganized. They shall be established in a manner and according to standards provided by law. The standards shall include population, geography, economy, transportation, and other factors. Each borough shall embrace an area and population with common interests to the maximum degree possible . . . . [87]

To the extent that the state was not completely organized into boroughs it would be comprised of one or more "unorganized boroughs" in which local government functions would be performed by the legislature acting as a borough assembly.[88] Cities could be incorporated and would be part of the borough in which they were located.[89]

In pursuit of the principles set out in the constitution, the legislature provided for the establishment of boroughs and cities with a high degree of locally exercisable powers. Boroughs are given area-wide powers throughout the incorporated territory, including in cities within them. One of the three mandatory areawide powers and duties to be exercised by every borough is education. "Each borough constitutes a borough school district and establishes, maintains, and operates a system of public schools on an areawide basis."[90] All home-rule and first-class cities exercise the same power so long as they are not within a borough.[91] A review of the state constitution, the implementing statutes, and available expressions of the intent behind them leads to the inescapable conclusion that operation of schools directly by the state is to be phased out in favor of municipal school districts.

C. The State Foundation Program

An important direction in Alaska education, consistent with a strong local government bent, is shown by the history of substantial state support of district schools. Shortly after statehood, the state board of education questioned the adequacy of the state support program which had been in effect since territorial days. The 1931 law providing that the territory assume most of the costs in such schools had been modified somewhat,[92] but the basic approach remained approximately the same. A report on a study by the Department of Education pointed out that merely paying a percentage of actual costs did not provide aid in proportion to needs.[93] The report recommended a foundation program under which the state would guarantee financing of the basic needs of local school districts, less a required local share based on available resources. The local share was to be made up (or exceeded) by local tax effort. Such a plan was enacted by the legislature in 1962[94] and became effective in 1964. The complicated formula in the 1962 statute redistributed state aid for education so that poorer districts (based on the size of the tax base) got more and richer districts got less aid.[95]

As the 1962 act was amended, the concept remained.[96] Based on a study committee's report,[97] however, the 1970 legislature made some major changes in the act.[98] Briefly stated, the new program called for determination of the "basic need" of a district. The amount of state aid to be paid toward basic need was to be adjusted by an "equalized percentage," which was based upon the relative wealth of the district. "Basic need" does not necessarily reflect actual needs of a district. Rather it is an amount approaching the cost of education as set by the legislature.

Under the statute basic need is established as follows. The number of "instructional units" in a school is determined based on the number of children who, on the average, are enrolled (average daily membership or ADM). A schedule of instructional units by school size is included in the statute.[99] Instructional unit allotments may be increased by a factor which reflects greater costs of transportation and operations by reason of remoteness or size of

87. The provision if implemented in Alaska Stat. Title 29. Requirements for organized boroughs are set out at Alaska Stat. § 29.18.030 (1972).

88. Alaska Const. art. X, § 6. See Alaska Stat. § 29.03.010 (1972) which states that all areas not in an organized borough constitute a single unorganized borough. The legislature has never sat as the assembly for the unorganized borough.

89. Alaska Const. art. X, § 7.

90. Alaska Stat. § 29.33.050 (1972). The other mandatory powers and duties are assessment and collection of taxes and planning, platting, and zoning. Alaska Stat. § 29.33.030 and .070 (1972). Additional areawide powers are acquired by transfers from cities and by areawide elections, § 29.33.250, and certain other powers outside cities can be approved at incorporation or added later, § 29.38.010 and .020.

91. Alaska Stat. § 29.43.030 (1972).

92. Ch. 27, [1953] Sess. Laws of Alaska; Ch. 68 [1953] Sess. Laws of Alaska; Ch. 49, [1955] Sess. Laws of Alaska.

93. E. Lindman, Alaska State Board of Education, A Foundation for Alaska's Public Schools (Sept. 1961).

94. Ch. 164, [1962] Sess. Laws of Alaska.

95. State aid under the new act ranged from 59% to 100% of operating expenses. R. Guthrie, A Brief Historical Review of Alaska's School Foundation Program 10 (Table 2) (State of Alaska Legislative Finance Division, December 12, 1974).

96. Ch. 70, [1963] Sess. Laws of Alaska; Ch. 153, [1966] Sess. Laws of Alaska; Ch. 125, [1968] Sess. Laws of Alaska; Ch. 95, [1969] Sess. Laws of Alaska. The 1969 Act added special state aid for districts impacted by state activities in the form of reimbursement to districts having children whose parents live and/or work on state (tax-exempt) property. This "mini-874" program operates similar to the federal impact aid program under P.L. 874 discussed *infra* in part II A.

97. J. Peterson, Final Report Memo to members of the School Finance Advisory Council, 27 January, 1970, discussed in R. Guthrie, A Brief Historical Review of Alaska's School Foundation Program 13-15 (State of Alaska Legislative Finance Division, December 12, 1974).

98. Ch. 238, [1970] Sess. Laws of Alaska.

99. Alaska Stat. § 14.17.041(1975). There are different schedules for schools under 1000 ADM, 1000 ADM or over, vocational education students, and special education students.

district.[100] The number of instructional units is multiplied by a "base instructional unit" (dollar amount) set from time to time by the legislature,[101] to yield "basic need." State aid payments toward basic need are then adjusted for variations in district wealth which is available to support education. This is done by determining the "equalized percentage" of costs to be supplied by the state.[102] This currently results in a minimum of 95 percent of basic need being supplied by the state to each district, with poorer districts getting a greater percentage.[103]

There have been discussions about increasing state support to 100 percent of basic need; already Alaska ranks second nationally in the percentage of revenues it provides from state sources.[104] Given the wide disparities in wealth among school districts and their greatly different needs, which are usually in inverse relationship to wealth (the most remote, rural areas have the highest costs but typically have a low tax base), substantial state aid is necessarily the backbone of Alaska rural education in the public schools.

School districts exist in Alaska only under municipalities having education functions. Most of rural Alaska is in the unorganized borough, which is in no school district at all. Thus, the foundation program is of limited relevance except to the extent it encourages or deters municipal incorporation.[105] Schools in the unorganized borough until 1976 were operated by the state directly with full funding by the legislature. The state-operated school system had always been considered an enigma by lawmakers and legislators and criticized by experts and lay observers alike. A frequent criticism was that it included far too much territory and had needs which were too divergent to be efficiently and effectively administered as a single service area. The control was said to be too remote from those whom it affected.

Since the early days of statehood a quest has continued for an acceptable and appropriate delivery system for educational services in rural Alaska. The first major effort was by the Governor's Committee on Education. The result of its work was a major report in 1963 entitled "An Overall Education Plan for Rural Alaska." The committee, which was chaired by Dr. Charles K. Ray of the University of Alaska, long a leader in Alaska education, recommended a system of elementary and junior high schools in villages with a minimum number of students (10 for elementary; 90 for junior high). For students from communities where 150 high-school-age children were not present, regional boarding high schools would be established with minimum enrollments of 300 students. The report emphasized the need to move toward a single school system under the state, but with continued federal financial support. High priority was placed on meeting needs of children for which no elementary or secondary education programs were available.[106] With some revisions, the plan has served to orient rural education. A change in direction from the concepts expressed in the plan was the result of recognition of long-standing Native sentiment favoring local, day high schools rather than regional boarding programs.[107] More recent trends are covered following the next section.

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100. Alaska Stat. § 14.17.051 (1975).

101. Alaska Stat. § 14.17.056(a), (b) (1976). The base instructional unit for the fiscal year ending June 30, 1978 is $27,500.00. In 1970 it was set at $19,250.00 Ch. 238, [1970] Sess. Laws of Alaska. Increases were enacted in 1973, 1974, 1975, and 1976. Ch. 173 [1976] Sess. Laws of Alaska. Adjustments in the instructional unit allotment are provided for by statute in order to compensate for cost differences due to geography, climate, and distance from transportation facilities.

102. The formula is:

$$P_i = 1 - (1-K)\frac{V_i}{V_s} \text{ where}$$

P_i = state share; K = 95%; V_i = value of property in district per pupil; V_s = average value of property per pupil statewide. Alaska Stat § 14.17.021 (1976).

103. In 1975, the law was amended to increase state support from 90% to 93%. Ch. 81, [1975] Sess. Laws of Alaska. The percentage was increased to 95% in 1976. Ch. 173, [1976] Sess. Laws of Alaska.

104. *R. Hartman & R. Reischauer, Reforming School Finance* 11 (1973).

105. The newly established regional education attendance areas are funded under a method which utilizes the foundation formula. Alaska Stat. § 14.08.121. See discussion *infra* in part III E.

106. Governor's Committee on Education. An Overall Education Plan for Rural Alaska (May 25, 1963, revised February 28, 1966), included in Ray, *supra* (Appendix E) at 78-101.

107. See discussion *infra* in part III.

Federal Programs of Financial Assistance

Since Alaska statehood a complex of munificent federal aid programs has developed. The purposes of most of the major programs and their importance to the state are discussed in this section. Continued federal support has been cited as the key to state assumption of education functions performed by BIA. Funds from federal programs related to the education of Native children have been especially critical for the state. Their availability has not been an important factor in promoting the transfer of educational responsibility to the state, however.

A. Impact Aid — P.L. 874

One of the greatest financial boons for state schools educating Native children has been federal impact aid under Public Law 81-874. This law was enacted in 1950 to assist local education agencies in operating and maintaining schools in areas affected by federal activities. The intent was to compensate communities for the effects of having real property removed from the local tax base because of the exempt nature of federally owned lands and sudden population increases due to federal activities. Financial assistance to school districts under P.L. 874 was according to a formula which placed federally connected children in categories for which rates of payments varied according to the degree of impact. The original impetus for the act came from the defense activities of the government. Because of areas of considerable military presence, the state has been relieved of much of the expense of operating on-base schools by aid under P.L. 874. At first Indians were excluded from being counted to determine the amount of federal assistance to which a district was entitled.[109] But in 1953 the law was amended to include Indians, reflecting the fact that most Indian lands are held by the government in trust for tribes or individual Indians and consequently are tax-exempt.[110]

P.L. 874 places children in two categories: category A—those who reside on federal property and have a parent employed on federal property; and category B—those who either reside on federal property or have a parent employed on federal property. For children in the first category the government pays the "local contribution rate" (an amount based on comparable districts' expenditures).[111] For children in the latter class, the government pays one half the local contribution rate.[112]

The 1953 changes which included Indians under the act left some ambiguities because a state's governor was to choose whether Indians would be counted for the act. Whether the choice to count Indians for P.L. 874 purposes excluded the state from funding under the Johnson O'Malley Act (JOM) was unclear, although many states interpreted the legislation as having that effect.[113] The uncertainty was resolved by a further amendment in 1958.[114] The amendment indicated that payments to school districts under provisions of JOM would not be deducted from P.L. 874 payments and any exclusion of Indians was removed. This in turn led to a change in the JOM regulations so that in districts eligible for P.L. 874 aid, use of JOM funds would be limited to supplemental aid rather than basic support of the districts in most circumstances.[115] This was the first clear articulation that JOM, unlike impact aid, could not be used for core expenditures of a school such as salaries, transportation, upkeep, and other things normally considered basic support. The limitation to use for supplemental purposes is important in most programs of federal assistance to education with the notable exception of P.L. 874 impact aid, which is not so restricted in its use.

A special exception in the impact aid act, created by the Alaska Omnibus Act shortly after statehood, gives the U.S. Commissioner of Education discretion to determine local contribution rates where a state agency is the local educational agency for a substantial proportion of the land in the state which is unorganized territory.[116] This provision applies

108. 20 U.S.C. § 236 *et seq.* (1974).

109. The legislative history and intent of P.L. 874 is discussed in detail in Study of Title II, *supra* at 68-87.

110. Act of Aug. 8, 1953, c. 402, § 1, 67 Stat. 530.

111. 20 U.S.C. § 238 (1976 Supp.). The local contribution rate is normally the per pupil share of all local revenues in the second prior year in comparable school districts of the state, but not less than one half the statewide or national average per pupil expenditure, whichever is greater, and not more than 100% of the statewide average.

112. *Id.*

113. Study of Title II, *supra* at 72-78.

114. Act of Aug. 12, 1958, P.L. 87-344, 27 Stat. 559. The act also had been amended in 1956. Act of Aug. 3, 1956, c. 915, 70 Stat. 970.

115. 25 C.F.R. § 33.4 (c). *as amended* 23 Fed. Reg. 7106 (1958). See Natonabah v. Board of Education of Gallup-McKinley School District, 355 F. Supp. 716, 726 (D.N.M. 1973).

116. Act of June 25, 1959, P.L. 86-70, § 18(d)(1), 73 Stat. 141. The exception recognized Alaska's special needs. It goes beyond the underlaying purpose of the act—relief from lost property taxes resulting from tax exempt status of federal lands. Native and federal lands in Alaska were exempt from tax under the Statehood Act, Act of July 7, 1958, P.L. 85-508, § 4, 72 Stat. 7999. To the extent this kept the legislature, acting as the assembly for the unorganized borough (*Alaska Const.* art. X, § 6), from instituting a local property tax scheme, it fits the act's rationale. But the exception was further justified in that finding comparable districts for setting local contribution rates would be nearly impossible because of special conditions which vary from place to place in Alaska.

only to Alaska, and under it the state has received a preferential rate for state-run schools in rural areas and on military bases of about twice that paid to city and borough school districts.[117]

The preferential rate has eased greatly the financial burdens on the state for running rural schools. But with the greater prosperity of the state in recent years has come a decision of the U.S. Commissioner of Education to phase out the preferential rate. Beginning in 1977 and for each successive year, the rate is to be diminished by 20 percent of the difference between the preferential rate and the normal rate, so that the state will receive only the normal rate in 1981 and later.[118] The prospect of losing the P.L. 874 preferential rate had been suggested in letters to the state from the U.S. Office of Education in 1973 and 1974.[119]

As the preferential rate diminishes, so does a disincentive to the state's promoting creation of municipal school districts. So long as a school was in the state-operated system, it would have the bulk of its costs paid for by the federal government under P.L. 874. As a district school, payments under the foundation program from the state to the district would come from the state treasury and P.L. 874 funds would be made directly to the district (at the normal rates). The districts receive aid at the rate of approximately one half the state average per pupil expenditure (for the second prior year); the state has been receiving twice that much for schools maintained by it, or approximately 100 percent of the average statewide per pupil expenditure. As explained above, the state foundation program supports at least 95 percent of "basic need" of school districts.

Another possible disincentive to the state's urging creation of municipal districts was recently removed, but at the same time formation of municipal districts may have been made less attractive to local taxpayers. Until the Education Amendments of 1974, federal impact aid could not be counted in determining need for purposes of fixing the amount of state aid.[120] Thus, if a new district were created in Alaska, the state would be paying at least 95 percent of "basic need," much of which formerly would have been reimbursed by the federal government. The district (not eligible for the preferential rate) would get about half of the federal payment formerly paid to the state but would not have to count it in figuring its need. This was like a bonus to the district. The amendments now allow consideration of these funds as a part of the equalization function of the foundation program.[121] Only recently has Alaska's equalization formula been amended in response to this change in federal law to provide for a consideration of federal funds.[122]

The importance of P.L. 874 impact aid has declined and will continue to do so as a result of the Alaska Native Claims Settlement Act.[123] Most of the lands where Natives now reside will pass into the private ownership of Native regional and village corporations created under the settlement act. Formerly nontaxable lands become taxable pursuant to that act after December 18, 1991, or when they are "developed or leased to third parties."[124] Even though the lands will technically be in private ownership, their tax-exempt status continues until that date or until they are developed or leased. With the tax exemption goes continued eligibility under P.L. 874.[125] But it is clear that Alaska's entitlement based on presence of Indian lands will gradually decrease over the next several years as lands become taxable, and will virtually cease in 1991.

B. Impact Aid (Construction) — P.L. 815

Another federal program similar in intent to P.L. 874 is Public Law 81-815.[126] It, too, was part of the package of "impact aid" enacted in 1950. The purpose of P.L. 815 was to provide financial assistance for construction of schools in federally impacted areas. Unlike P.L. 874, P.L. 815 allowed Indians to be counted from the start in determining a district's eligibility for aid. In practice, few were counted, however, as the act was administered to respond to impacts on communities from defense and military activities—the primary reason for its enactment.[127]

Alaska's Indian and Native population has never accounted for much aid under P.L. 815. In fact,

117. 20 U.S.C. § 238(d)(3)(B)(iii) (1976 Supp.).

118. Letter from Nathaniel H. Cole, Deputy Commissioner, Alaska Department of Education, to David Getches dated April 12, 1976. The effect of the loss of preferential rate is cushioned somewhat by 1974 amendments to the act. 88 Stat. 522. The amendments include all Indian children in the category for which full payment of the local contribution rate is made, thus increasing payments for Indian parents who work off federal land. Another important change was to give priority to payments for Indian children when Congressional appropriations are inadequate to pay for entitlements nationally.

119. See Letter from T. H. Bell, U.S. Commissioner of Education to Marshall L. Lind, Commissioner of Education, Alaska Department of Education, dated July 9, 1974, contained in M. Lind, Alaska State Department of Education, SOS/BIA Schools Dissolution, Exh. I (n.d.) in which a phase-out of the preferential rate over 3 years was mandated. Later negotiations led to the five-year phase-out described in the text.

120. Carlsbad Union School Dist. v. Rafferty, 300 F. Supp. 434 (S.D. Cal. 1969); Shepheard v. Godwin, 280 F. Supp. 869 (E.D. Va. 1968); Hergenrether v. Hayden, 295 F. Supp. 251 (D. Kan. 1968); School Dist. No. 3 v. Jorgenson, 293 F. Supp. 849 (D.S.D. 1968).

121. 20 U.S.C. § 240(d)(2)(A) (1976 Supp.).

122. Alaska Stat. § 14.08.121(a) as amended by Ch. 90, [1977] Sess. Laws of Alaska, § 1(a)(i). *See also* Alaska Stat. § 14.17.061(c) (1974) which includes federal aid for the purpose of computing state supplemental aid.

123. 43 U.S.C. § 1601-1624 (1976 Supp.).

124. 43 U.S.C. § 1620(d) (1976 Supp.). The tax exemption of individual Indian allotments remaining in trust will not be affected. *See* 43 U.S.C. § 1617(a) (1976 Supp.); 25 U.S.C. § 334, 337 and Act of May 17, 1906, 34 Stat. 197.

125. 43 U.S.C. § 1620(e) (1976 Supp.).

126. 20 U.S.C. § 631-647 (1974), *revising and reenacting* Act of Sept. 23, 1950, c. 995, 64 Stat. 967.

127. Study of Title II, *supra* at 88.

between 1972 and 1974 the state received no funds at all under the act. But in fiscal year 1975, Alaska's State-Operated School System got $2,835,000.00 to help defray costs of new schools in Togiak and Unalakleet.[128]

The importance of P.L. 815 in Alaska and elsewhere in recent years has been minimal due to almost insignificant funding relative to the need. In response to the virtual obsolescence of P.L. 815 and the dire need for Indian school construction funds, Congress established a parallel program as a part of the Indian Self-Determination and Education Assistance Act of 1975.[129] The act authorizes funding of $35 million a year for three years, at least 75 percent of which is to be used for Indian schools according to P.L. 815 eligibility requirements. However, up to 25 percent is earmarked for construction, acquisition, or renovation of "previously private schools" (such as mission schools) now under Indian control.[130]

C. Johnson O'Malley Act

As mentioned above, the Johnson O'Malley Act[131] has greatly aided rural Alaska schools and made feasible the transition from BIA to state control of many of them. The program has grown from one serving 56 eligible children in 1952 to a 14,880-student program in 1975.[132] The act gives the Secretary of the Interior authority to contract with the state and with local agencies and corporations for the education of Indian children. Contracts under the act provided vitally needed funds for districts and for schools operated by the state in Alaska and elsewhere.

Use of JOM for operational expenses of an adequate basic school program may have been consistent with one of the act's original intents—to shift responsibility for educating Indian children from the federal government to the states.[133] Soon after the enactment of JOM, mention of using funds for "special services required for Indian children" crept into committee reports of hearings on appropriations. "The evolutionary process whereby states gradually would assume responsibility for the basic education of all Indian children because they were citizens was gaining momentum, and JOM funds were being pushed toward supplementary programs."[134] Although early uses of JOM were for "tuition money," the theory that it was a program for the special needs of Indian children actually began in the thirties.[135]

The method of administering JOM aid differed tremendously from the expressions of legislators indicating that it should be for supplemental programs. The states had grown to expect federal support for Indians in public schools. Many years of tuition payments which were intended to compensate for loss of local taxes by local and state governments due to the presence of nontaxable land led to the assumption that JOM was playing the same role.[136]

This purpose well fit Alaska's needs, and it would have been unrealistic to expect an overnight change to independence from federal aid.

Aid under the act might have been administered to shepherd the states into the business of educating Indians, culminating in full state support of educational programs for all children, with supplementary programs for Indians. That transition, however, was prolonged by regulations in 1951 and 1956 which required the presence of large blocks of untaxed land for a district to be eligible.[137] Although supplemental programs could be funded and a few were, the regulations provided a good indication of how the program in fact was administered. In many places, including Alaska, it was something of an Indian impact aid program.

With the inclusion of Indians among those qualifying for impact aid under P.L. 874 in 1958, much of the logic of using JOM for basic support disappeared. Accordingly, the JOM regulations were revised so that JOM spending for basic support would be limited to "meeting educational problems under extraordinary or exceptional circumstances" in districts eligible for P.L. 874 aid.[138] However, as recently as 1975, congressional hearings revealed that in spite of the 1958 regulations, most of the JOM funds nationally still were being used to satisfy the districts' basic needs.[139] While an increasing amount of JOM assistance was targeted by BIA for "special services," that term was loosely interpreted by school districts.[140]

In Alaska JOM funds generally were contracted to the state. In 1970 the state and the BIA entered into an agreement constituting the JOM state plan. The plan anticipated that there would be annual contracts directly with the state. It recited that "extraordinary and exceptional circumstances currently exist in Alaska which can only be met through financial assistance from the Bureau of Indian Affairs," tracking the language of the regula-

128. 2(c) Report: Federal Programs and Alaska Natives—Task II—Federal Programs for Alaska Natives' Benefit (n.d.) (hereinafter cited as 2(c) Report).

129. 25 U.S.C. § 450 *et seq.* (1976 Supp.). Other provisions of the Indian Self-Determination and Education Assistance Act are discussed *infra* in Part II G.

130. 25 U.S.C. § 458(c) (1976 Supp.).

131. 25 U.S.C. § 452 (1970).

132. Study of Title II, *supra* at 192-93.

133. *Id.* at 16.

134. *Id.* at 17.

135. *Id.* at 19. Early regulations of the BIA did not require such uses, however. *Id.* at 37.

136. *Id.* at 43.

137. *Id.* at 44.

138. *Id.* at 46.

139. *Id.* at 47, *citing Hearings on Rules and Regulations for the Administration of the Johnson O'Malley Act before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess. 34 (1975).

140. *Senate Committee on Labor and Public Welfare, Indian Education: A National Tragedy—A National Challenge*, S. Rep. No. 91-501, 91st Cong., 1st Sess. 40 (1969) (hereinafter cited *A National Tragedy—A National Challenge*).

tions.[141] Most of the aid which was provided under contracts pursuant to the agreement was used to support the state's boarding home program. That program was instituted by the State Board of Education in 1967. Under it, Native students from villages lacking high schools were brought into larger communities which had them. The students then lived with local families while attending school.[142]

Use of JOM funds for the boarding home program was justified as proper by classifying the added costs of transportation and paying for students' room and board as special education needs over and above normal school costs.[143]

Alaska's JOM expenditures for the boarding program were challenged by parents of several Native school children in an administrative appeal to the Secretary of the Interior.[144] It was argued that the greater cost of furnishing a secondary education was a basic cost of the school system as much as bus transportation is in other places where some children live close enough to a school to walk and others live farther away. But the Secretary held that the boarding program was not "basic" in that "it is not ordinarily furnished to students elsewhere in Alaska, i.e., those in local school districts. From that perspective the program may appear designed to meet the special needs of rural students."[145]

The most glaring error in the Secretary of the Interior's decision upholding the Alaska plan is its failure to recognize that JOM is not intended for rural students, but for Indians. Non-Indians from rural areas attended the boarding home program at state expense, but JOM was used to pay nearly all the costs for similarly situated Natives. The test differentiating "basic" from "special" programs asks whether the services are "normally and ordinarily furnished to all students in one district or to students in all the districts in the state."[146]

The standard assumes that to be basic, services must be furnished to all similarly situated students (e.g., those without access to high schools) regardless of whether they are Indian. The Secretary overlooked this necessary implication. Had he read the standard with it in mind, he would have had to find that the boarding program was basic because it was supplied to non-Native students in remote areas at state expense. It should be immaterial that the boarding program is not available to a student in Anchorage who lives two blocks from a high school.

Because of the conclusion that the boarding program was not basic, the Secretary did not have to reach the question of whether its funding might be justified by "extraordinary" and "exceptional" circumstances. This would have been the most legitimate rationale for validating the boarding program, but the record did not support the requisite finding. The area office of BIA was chided for not insisting that the state justify the challenged uses of JOM in its application for aid and warned that "the Bureau in executing contracts providing reimbursement for basic, operational expenses should make detailed findings on this matter, and submit a statement of reasons therefore."[147] There appears from the decision some suggestions that had there been a sufficient showing under the "extraordinary and exceptional circumstances" exception, the boarding program might have been justified on that ground. Instead the decision went to great pains to find that the program was supplemental. This may be explained partly by the fact that the fiscal year for which use of JOM funds was challenged was then fast drawing to a close. Nearly $4 million of JOM funds earmarked for the boarding programs had been spent or obligated.[148]

It would have been disruptive, to say the least, for Interior to require immediate reallocation[149] after several years of unabashed BIA support of the program, let alone require repayment (which was not sought by the Native appellants). The decision was probably influenced, too, by indications from the state (which intervened in the appeal) that it would seek fully to fund the boarding program in 1975.[150] Furthermore, Interior must have been aware that administration of JOM funds was taking an important turn in the direction of Native control. The State Board of Education, just two months before Interior's decision on the administrative appeal, directed the State Department of Education to cease its role as sole administrator of the JOM program and called

141. "An Agreement Between the State of Alaska and the Bureau of Indian Affairs for the Administration of Johnson O'Malley Act Funds" (Alaska State Plan), 1970, included as Appendix B in Ray, *supra* at 44-49.

142. Alaska Department of Education, Coordinators' Guide to the Boarding Home Program (Feb., 1970), included as Appendix G in Ray, *supra* at 118-32.

143. 2(c) Report, "Johnson O'Malley Program" 1. *See* Natonabah v. Board of Education of Gallup-McKinley School Dist., *supra*.

144. Appeal and Petition of Molly Hootch, *et al.* re Administrative Determination of B.I.A. Juneau Area Office, August 15, 1973 (Dept. of Interior) (hereinafter cited as Hootch administrative appeal).

145. *Id.*, Decision dated May 6, 1974 at 7.

146. Natonabah v. Board of Education of Gallup-McKinley School Dist., *supra* at 726.

147. Hootch administrative appeal, *supra*, Decision dated May 6, 1974 at 10.

148. Alaska was at the time contracting for about one fifth of the total JOM funds available nationally. 2(c) Report, *supra* "Johnson O'Malley Program" 1.

149. During pendency of the Hootch administrative appeal the Department of Interior had withheld $1,156,250 which was due the state under the FY 1973 JOM contract.

150. The proponents of the administrative appeal were in the midst of litigation in which they were attacking the boarding programs as denying them equal educational opportunity and as violating the state constitutional mandate that schools be "open to all children of the state" (Alaska Const. art. VII, § 1). They sought provision of secondary schools within or nearby their home villages. Hootch vs. Alaska State-Operated School System, No. 72-2450, Superior Court of the State of Alaska Third Judicial District, on remand after appeal from partial summary judgment, 536 P. 2d 739 (Alaska, 1975). See discussion *infra* in Part III B.

upon BIA to create a statewide JOM program review committee to maximize Native input. Such a group was formed, consisting of members chosen by each of the 12 regional corporations set up under the Alaska Native Claims Settlement Act. The committee began screening proposals and recommending which should be funded in 1975.[151]

One of the first acts of the committee was to indicate that it considered the boarding home program to be basic and not supplemental. In spite of its reservations about the program's educational value, the committee approved the use of JOM to fund it for the ensuing year (FY 1974). It opposed any use of JOM for the boarding program in FY 1975, however.[152]

New JOM regulations were adopted and became effective on September 30, 1974. They were designed to correct past abuses and ambiguities and to signal some new directions in the program.[153] They emphasized special educational needs, parent participation and control, and accountability. The new regulations were developed in a series of meetings among BIA officials and numerous Indian interest organizations, including Alaska Native groups.[154] Special hearings were held soon after their adoption to ascertain the views of all interested parties, including Indians, tribes, organizations, educators, and school officials.[155] The hearings were open, public participatory meetings, unusual for congressional committees.

Some controversy necessarily had been sparked by the new regulations because they placed much of the control of JOM funds outside the customary channels—away from professional educators and into the hands of Indian parents. This understandably was threatening to many school officials who had used JOM funds with few impediments for many years. Indian Education Committees were to participate in planning programs, negotiating contracts, and evaluating and monitoring funded projects. The committees had full veto power over all supplemental programs and expenditures.[156]

Also disturbing to some states and school districts was the tightening of restrictions on use of JOM for basic support found in the 1974 regulations. Only on a showing that minimum state standards cannot be satisfied after a reasonable local tax effort (at least equal to the state average) and use of all other sources of aid, including P.L. 874 and state aid, can a district receive JOM aid for basic operating needs. And only those districts with a 70 percent Indian enrollment are eligible in any event.[157]

Alaska was not as concerned as many other states because it was on the road to conformity with the concepts embodied in the parent participation provisions and the restrictions on use of JOM for basic programs found in the 1974 regulations. There already was a statewide JOM review committee and the state and BIA were earnestly trying to make the JOM truly supplemental as the state's JOM program review committee was insisting it ought to be. The commitment was also in response to views from Native communities combined with the new federal policy of Indian self-determination. The movement was probably buoyed in part by the cautionary words in the decision on unsuccessful administrative appeal described above.

There are some parts of the 1974 regulations which were very important to Alaska. The manifestation of intent, JOM funds not be tied to public school districts but may be used in Indian community projects and by Indian corporations, makes it easier for village and regional corporations organized pursuant to the Alaska Native Claims Settlement Act and nonprofit Native corporations which exist at the state, regional, and community levels to contract for the funds.[158]

Potentially of special importance to Alaska are the parts of the regulations requiring equalization of aid on a per capita basis among and within states.[159] Alaska, as the state with the single largest share of Johnson O'Malley ($5,684,000 in fiscal 1975) had the most to lose under the equal distribution regulations.[160] Although there had been wide variations in per pupil allocations among contracts let by the BIA and among states, the amount of those contracts did not correlate with demonstrated needs or numbers of Indian children in the districts.[161] Factors such as

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151. 2(c) Report, *supra*, "Johnson O'Malley Program" at 1.

152. *Id.* The decision of the Hootch administrative appeal required that the supplemental nature of programs be justified each year and suggested that continuing a program for several years could make it basic. Hootch administrative appeal, Decision dated May 6, 1974 at 9. Thus, it may have been more difficult to justify the boarding program as a proper use of JOM funds in successive years, in any event.

153. 25 C.F.R. part 33 (now 25 C.F.R. part 273). Further, but not significant, revision of the regulations, and a recodification of existing regulations, became effective on December 4, 1975 as a result of the Indian Self-Determination and Education Assistance Act which made some changes in JOM. 40 Fed. Reg. 51303-10 (Nov. 4, 1975). Citations to the new, 1975 codification in the Code of Federal Regulations are given in the footnotes, along with an indication of any substantive change.

154. *See Alaska Federation of Natives, et. al., Proposed Johnson O'Malley Regulations*, February 28, 1974. This was the basic draft from which the finally promulgated regulations were taken.

155. *Hearings on Rules and Regulations for the Administration of the Johnson O'Malley Act before the Subcomm. on Interior and Insular Affairs*, 93d Cong., 2d Sess. (1975).

156. Under the present regulations the veto power extends to all programs, basic as well as supplemental. 25 C.F.R. § 273.16 (2) (revising 25 C.F.R. § 33.3(d)).

157. 25 C.F.R. § 273.13(b).

158. 25 C.F.R. § 33.2(b), (now 25 C.F.R. § 273.37).

159. 25 C.F.R. § Subsection (a) & (b) now provide for the phasing out of existing noncomplying operational support programs in FY 1977 and 1978 with a one-third reduction each year, and assurance that supplemental programs will be no less than 75% for FY 1977 of sums received in FY 1975.

160. Study of Title II, *supra* at 193.

161. *Id.* at 161-71.

past administrative practice, the applicant's sophistication, and relationships with BIA may have been influential in attracting better contracts. Thus, the regulations sought to insure greater fairness and equity.

The equalization provisions allow consideration of the varying costs of delivering education among states.[162] But disparities in educational costs and in special cultural, linguistic, social, or educational needs which are unique to areas within a state may only be reflected in distribution among contractors if the commissioner makes an exception.[163] "Obviously, in a state such as Alaska the costs of educational services in Anchorage are considerably lower than on the North Slope."[164] If equalization is rigidly applied, much of the latitude and imagination that could come with control by a local Indian community would be lost. The local role in defining needs certainly becomes less relevant if there is a rigid per capita entitlement.

Congress recognized the problems which might be created for some areas and states and was aware that limited appropriations would be diluted to the point of ineffectiveness if equalization of JOM were strictly carried out. Congress included in its fiscal 1976 appropriations act a proviso that equalization cannot result in reductions for any state from the prior year's contract amount.[165] This is a stop-gap measure and cannot replace more adequate funding of the act.

In 1975, the Indian Self-Determination and Education Assistance Act was passed by Congress.[166] Title II of the Act amended the Johnson O'Malley Act for the first time since 1936.[167] States are required to submit an education plan with "objectives which adequately address the educational needs of the Indian . . . beneficiaries of the contract."[168] Besides requiring a plan, the legislation attempts to prevent public school districts from diverting JOM funds into general support by requiring that where non-Indian students participate in programs under the contract, money spent will be prorated to cover only participation of Indian students.[169] Every school district affected by a JOM contract must have an elected Indian parent committee which has authority to approve or reject programs.[170] No such committee is required if there is a majority of Indians on the local school board; former JOM advisory boards can be the committee if the pertinent tribal governments (villages and regional and village corporations in Alaska) consent. Similarly, they may consent to use of the Indian Education Act committees for JOM purposes.[171] Unlike the JOM committees called for by the act, these committees are selected not just by participating Indian parents, but by teachers, too, and they need to contain only a majority of Indian parents.[172]

The Alaska Federation of Natives (AFN) (a statewide Native organization) in 1973 became the prime contractor with BIA for all JOM programs except within the Aleut region where the Bureau contracted directly with the Native corporations.[173] AFN and Aleut then contracted with local education agencies and Native profit or nonprofit corporations for special programs recommended by the local Indian education committees. AFN's operation of the program was under the statewide JOM review committee which reviewed program proposals submitted by prospective contractors.[174] For fiscal 1975, 120 proposals totalling $11 million were submitted.[175] Of these, 40 were funded.[176] The proposals were evaluated based on need, direct benefits to Native students, and outreach to as many students as possible.[177]

A question has been raised as to whether all villages have benefited under the act as administered by AFN because overlapping, although nonduplicative, programs were funded.[178] The problem was that many good programs addressing different objectives (e.g., a regionwide bilingual program, a village cultural heritage program, a multivillage course on the claims settlement act) may have been concentrated on some villages while missing others entirely.

A new JOM state plan is being developed by AFN which should lead to alleviation of problems of coordination and distribution consistent with the new regulations. The work is in progress with input coming from all of the 12 Native regions in Alaska.[179]

AFN determined in 1976 that it would no longer be able to serve as the prime contractor for JOM in Alaska.[180] In fiscal 1977, the BIA contracted directly with entities which formerly would have been subcontractors. Heavy reliance for choice of programs to be funded remained upon the local Indian education committees.

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162. 25 C.F.R. § 273.31(a). The need for more aid per student in some states was recognized in the regulations largely as the result of urgings by Indian and Alaska Native groups. *Alaska Federation of Natives, Proposed Johnson O'Malley Regulations, supra* at 13-14.
163. 25 C.F.R. § 273.31(b) & (c).
164. Study of Title II, *supra* at 168.
165. Act of Dec. 23, 1975, Pub. L. No. 94-165, 88 Stat. 985.
166. Act of Jan. 4, 1975, Pub. L. No. 93-638, 88 Stat. 2206; 25 U.S.C. § 450-458e (1976 Supp.).
167. Act of June 4, 1936, c. 490, 49 Stat. 1458.
168. *Id.* at § 455.
169. *Id.*
170. 25 U.S.C. § 456 (1976 Supp.).
171. *Id.*
172. See 20 U.S.C. § 241 dd(b)(2)(B)(ii) (1974).
173. 2(c) Report, *supra*, "Johnson O'Malley Program" at 3.
174. Study of Title II, *supra* at 193-94.
175. 2(c) Report, *supra*, "Johnson O'Malley Program" at 8.
176. Study of Title II, *supra* at 193.
177. *Id.* at 194.
178. *Id.* at 195.
179. *Id.* at 194.
180. *See* Minutes, Statewide Johnson O'Malley Native Education Committee, Jan. 27-28, 1976.

D. ESEA Title I

In 1965, Congress enacted the Elementary and Secondary Education Act (ESEA).[181] The act was based on the well-established proposition that children of low-income families have special educational needs and that concentrations of such families have an impact on local education agencies. Grants under Title I of the act are for "meeting the special educational needs of educationally deprived children." [182] The impoverished villages of Alaska with great numbers of children in need of compensatory education were especially appropriate targets for Title I aid.

A district's entitlement to funds under ESEA Title I is the number of children from low-income families, as determined by a statutory definition of poverty level, multiplied by 40 percent of the state's average per pupil expenditure [183] The State Department of Education receives a lump sum payment from the U.S. Commissioner of Education, the size of which is fixed by these calculations. The state agency then approves and funds programs for educationally disadvantaged children which are proposed by local school districts and which meet the requirements of the act.[184] The state agency must then monitor the program and fiscal aspects of funded projects. School districts receiving Title I grants are required to use funds in programs which supplement, and not supplant, state and local expenditures.[185] Thus a district must use state and local funds in Title I schools in amounts per student which are comparable to such amounts in non-Title I schools. In other words, Title I uses are to be in addition to the normal school program and those which would not and could not be provided without federal assistance.

All children counted for Title I purposes do not participate in funded programs because local education agencies are to concentrate the monies on programs for a limited number of students in order to secure a strong and effective program. Local officials select as "target schools" for Title I services those which have the highest concentrations of eligible (poverty level) students. [186]

Parent advisory councils for each district and each target school are required to be involved in planning, implementing, and evaluating programs under the act and are entitled to access to information concerning programs and projects.[187] As the name indicates, the parent committee's role is advisory only and varies in importance from community to community.

Although the Title I legislation has been modified somewhat, the program has remained essentially the same. One notable change for Alaska occurred in 1966. The act was amended to add a provision for educationally deprived Indian children on Indian reservations served by BIA schools.[188] A special "set aside" was authorized for that purpose. The Bureau of Indian Affairs receives one percent of the Title I funding nationally which it then allocates to the various BIA area offices, including the Juneau Area Office which serves Alaska. The area office allocates funds within the state partly based on numbers of students, partly based on whether monies are needed for starting new projects. Some small schools get additional funds in recognition of their greater operating costs.[189]

Alaska has received large grants for ESEA Title I purposes. In fiscal 1974, $5,680,710 was allocated—$2,898,078 to the State Department of Education and $2,782,632 to the BIA.[190] This makes Title I the largest categorical program in the state. Higher incomes due to increased job opportunities and distributions to Native shareholders as a result of the Alaska Native Claims Settlement Act may reduce the number of students eligible for Title I.[191] Title I programs in Alaska now necessarily exclude thousands of children, however. Presumably, Title I funds can be used for the benefit of eligible children whose needs are now unmet, and funded programs will continue to be of great importance in rural Alaskan education.

A pervasive problem in administration of Title I is that typically there is a long delay in receiving payments from the federal government. Congressional allocation occurs after programs are underway; it is even longer before funds are received. Programs often suffer because they must begin long before funds are available or even the amount of the grant is known.[192] Assurance in the statute that funding will be at least 85 percent of the last year's allocation [193] is not a sufficient base for sound program planning. In Alaska, where supplies must be ordered as much as

181. Act of Apr. 11, 1965, Pub. L. No. 89-10, Title I, 79 Stat. 27; 20 U.S.C. § 241a *et seq.* (1976 Supp.).

182. 20 U.C.S. § 241a.

183. *Id.* at § 241c. The per pupil expenditure cannot be less than 80% or more than 120% of the average per pupil expenditure nationally. The formula was originally 50% of the product of the low-income factor times the per pupil expenditure. Adjustments in the low-income factor have qualified more people, however.

184. *Id.* at § 241e.

185. 20 U.S.C. § 241e(a)(3) (1974). Until a 1970 amendment (Act of Apr. 13, 1970, Pub. L. No. 91-230, Title I, 84 Stat. 124) the requirement was found in the guidelines. ESEA Title I Program Guide No. 44, Guideline 7.1 (Mar. 18, 1968).

186. 45 C.F.R. § 116.17 (d).

187. 20 U.S.C. § 241e(a)(14). This requirement was added to the statute in 1974. Act of Aug. 21, 1974, Pub. L. No. 93-380. Title I, 88 Stat. 496. It strengthened the requirement of parent advisory committees then in the regulations. 45 C.F.R. § 116.17(o).

188. Act of Nov. 3, 1966, Pub. L. No. 89-150, Title I, 80 Stat. 1191; 20 U.S.C. § 241c(a)(1)(C) (1974).

189. 2(c) Report, *supra*, "Title I, part A, ESEA," at 6.

190. *Id.*

191. *Id.* at 10-11.

192. Study of Title II, *supra* at 269.

193. 20 U.S.C. § 241h (1976 Supp.).

a year in advance, there is necessarily a crippling time lag caused by the delay.[194]

Lack of federal controls combined with pressing local needs invites serious abuses of Title I funds. Use of them for general support, allowing them to displace (supplant) local expenditures, spending them for all children and not just eligible children, and failing to concentrate use of the funds on less than all eligible children are common.[195] In 1969, ESEA's prohibition of such abuses was strengthened.[196]

Misuses of Title I funds in Alaska have been discovered. A 1971 Department of Health, Education and Welfare, audit revealed use of Title I for basic support of the state-operated schools rather than solely for educationally disadvantaged children.[197] The State Department of Education was directed to end its unlawful practices, but a 1974 review found that a few projects in the state still were using Title I funds for general support.[198] There is no indication that similar investigations have been made of BIA Title I usage. It may be that since nearly every child is eligible, BIA administrators should not be held to the same standard. But the law does require concentration of the available funds for particular programs, and it appears that the BIA is complying.[199]

Although the only detected misuses of Title I funds in Alaska have been minor, the state and BIA should be especially vigilant. The U.S. Office of Education has remedies,[200] although it rarely exercises them. There is also the possibility of costly and time-consuming litigation which could force reallocation of funds, even retroactively.[201] But perhaps the greatest threat is from Congress, which has in the past expressed its displeasure over abuses in the program and the failure of the Office of Education to do anything about them.[202] In the future such displeasure could take the form of stricter and more complicated administrative requirements, smaller appropriations, or curtailment of the program. But the greatest reason for using the funds in conformity with the law is that they are held by the state and local education agencies as a trust, exclusively for poverty level children determined to be educationally disadvantaged.

194. The Education Amendments of 1974 provide for research on the extent to which planning and programming are handicapped by late funding of Title I. Act of Aug. 21, 1974, Pub. L. No. 93-380, Title VIII, 88 Stat. 601.

195. *See generally*, An Even Chance, Ch. III, *supra*.

196. Act of Apr. 13, 1970, Pub. L. No. 91-230, Title I, 84 Stat. 124-26 (20 U.S.C. § 241e & f).

197. 2(c) Report, *supra*, "Title I, part A, ESEA" at 11.

198. *Id.*

199. In 1974 services were programmed for less than one half the eligible BIA students. By contrast the state programmed funds for all but about 10% of its students. Study of Title II, *supra* at 268-69.

200. 20 U.S.C. § 241j (1976 Supp.).

201. *Cf.*, Natonabah v. Board of Education of Gallup-McKinley School Dist., *supra*.

202. Study of Title II, *supra* at 101-02.

E. ESEA — Other Titles

Two other sections of the ESEA have been important for the education of Natives in Alaska. Title II provides special grants for library resources, including audio-visual equipment and materials for schools getting Title I aid. The act was early amended to provide for participation by BIA schools.[203] In 1972, the Indian Education Act[204] made it possible for discretionary grants for library resources to be received under a new section.[205]

Title VII of the ESEA was added in 1968, providing aid to support bilingual programs for children of limited English-speaking ability.[206] BIA schools and nonprofit or tribal reservation schools were included in the act in 1970.[207] The congressional hearings make it clear that there is to be parental and tribal participation in the development and operation of projects under the act.[208] There is no statutory requirement to this effect, but the regulations do require parent participation.[209]

It appears that programs under the ESEA are here to stay, at least for the foreseeable future. The Education Amendments of 1974 authorized the programs to continue to June 30, 1978, updated the Title I aid formula, and expanded the Title VII bilingual program, especially with respect to Indians.[210]

F. Indian Education Act of 1972

In reaction to extensive documentation that education of Indians has been abysmally poor and that special federal programs in many cases have given short shrift to Indian students because of the way they are administered,[211] the Indian Education Act was passed in 1972.[212] The act amends P.L. 874 and ESEA, largely by adding special programs to benefit Indians to existing aid provisions.

Part A of the act amends P.L. 874 to authorize new grant funds for pilot programs, planning projects, and equipment to meet the special educational needs of Indian children.[213] Programs must be formulated in consultation with Indian parents, including holding

203. Act of Nov. 3, 1966, Pub. L. No. 89-150, Title II, 80 Stat. 1191.

204. Act of June 23, 1972, Pub. L. No. 92-318, Title IV, 86 Stat. 335. The act is discussed in more detail *infra* in Part II F.

205. 20 U.S.C. § 887c(c)(1)(C) (1974).

206. Act of Jan. 2, 1968, Pub. L. No. 90-247, Title VII, 81 Stat. 816; 20 U.S.C. § 880b, 880b-5 (1974).

207. Act of Apr. 13, 1970, Pub. L. No. 91-230, Title I, 84 Stat. 151; 20 U.S.C. § 880b-3a (1974).

208. 1970 U.S.C. Cong. & Admin. News 2803.

209. 45 C.F.R. § 123.16.

210. 20 U.S.C. § 880b-7—880b-13 (1976 Supp.).

211. See *A National Tragedy—A National Challenge*, *supra*.

212. Act of June 23, 1972, Pub. L. No. 92-318, Title IV, 86 Stat. 335; 20 U.S.C. § 241aa-241ff, 887c, 1119a, 1211a, 1221f-h (1974).

213. 20 U.S.C. § 241cc (1974).

public hearings and the participation and approval of a committee having a majority of Indian parents.[214] Ten percent of the funds for this section is earmarked for Indian-controlled schools.[215]

The act creates an "entitlement" program. Thus, funds have been distributed within Alaska's state-operated school system among regions corresponding to the 12 regions under the Alaska Native Claims Settlement Act, roughly in proportion to numbers of eligible students.[216] The amount of the grant is determined by multiplying the number of eligible students by the statewide average of per pupil expenditures of local agencies combined with direct state expenditures.[217] In fiscal 1974, $3,706,936 was paid under the act for programs in Alaska.[218] They included cultural heritage, land claims and bilingual-bicultural classes, and counseling services.[219] Within each region funds are allocated among schools by a regional parent advisory committee. The projects are designed at the local level by parent advisory committees for particular schools.[220] Grants are funded rapidly. Proposals are generally submitted in March, a decision reached in June, and operations begun in September.[221]

Part B of the Indian Education Act allows for discretionary grants under the ESEA for special projects to meet remedial education needs of Indian children.[222] The Alaska Native Education Board, a nonprofit corporation with representatives from the 12 regions, operated a bilingual-bicultural program under this part of the act in fiscal 1974 and 1975.[223] The Cook Inlet Native Association was funded for a Native Cultural and Youth Center in 1975.[224] Total funding of Part B in Alaska for fiscal 1974 programs was $253,000.[225]

G. Indian Self-Determination and Education Assistance Act

The most recent federal legislation dealing with Indian education is the Indian Self-Determination and Education Assistance Act of 1975.[226] The first title of the act is designed to strengthen tribal governments and permits them to contract to take over planning, conduct, or administration of nearly any service performed for Indians by the Bureau of Indian Affairs or the Department of Health, Education, and Welfare. This would include assumption of BIA school operations or some part of them (e.g., administration, plant operation, and instruction services) and anything now covered by the Johnson O'Malley program.[227] Because many Indian groups may not be equipped to assume this responsibility, the Secretary can make grants to assist them in designing programs to improve their capacity to enter into contracts with the federal government and generally to improve tribal government by developing and administering their own planning and other systems.[228]

Villages and regional and village corporations are eligible as "Indian tribes" for grants and contracts under this act.[229] In addition, when the appropriate tribe requests, any Indian organization made up of persons democratically selected from the community to be served would be eligible to contract to take over all or part of BIA school operations or other such programs.[230] Thus, village and regional nonprofit Native corporations and the Alaska Federation of Natives would qualify. Similarly, a school district board or board of a regional education attendance area, with a majority of Native members, can contract to perform education and other functions now under the BIA if the appropriate village or regional corporation requests. As yet, neither those Native groups defined as tribes nor those defined as Indian organizations have sought to take over BIA schools. If and when they do, the Secretary will be obligated to enter into a contract with them, absent an appropriate justification for his refusal.[231]

The mechanisms provided under the act are adequate to pave the way to assumption of local Native control of BIA schools. BIA may see shifting management of its schools in Alaska to Natives as a step away from the ultimate goal of transferring all schools to the state, but the dominant federal policy embodied in the act is one of fostering self-determination. There should be no dilemma for federal officials, however, as a strong congressional policy eclipses the administrative goal of transferring BIA schools to the state. To be sure, contracting with Natives will mean continued federal expenditures for Alaska Native education which could be avoided by a state (or district) takeover of a BIA school. But this result is consistent with the act's purpose.

As discussed earlier, Title II of the Indian Self-Determination and Education Assistance Act also changed the manner in which JOM aid is administered.[232] Title II of the act also has an important provision for funding tribes and tribal organizations which operate previously private (i.e. mis-

214. *Id.* at § 241dd(b)(2)(B).
215. See 20 U.S.C. § 241bb(b) (1974), amended by Education Amendments of 1974 to increase percentage from 5 to 10 percent. 20 U.S.C. § 241bb(b) (1976 Supp.).
216. Study of Title II, *supra* at 269.
217. 20 U.S.C. § 241bb(a) (1976 Supp.).
218. 2(c) Report, *supra*, "Indian Education Act" at 5.
219. Study of Title II, *supra* at 269.
220. 2(c) Report, *supra*, "Indian Education Act" at 4.
221. *Id.* at 7.
222. 20 U.S.C. § 887c (1974, 197 Supp.).
223. 2(c) Report, *supra*, "Indian Education Act" at 7.
224. *Id.*
225. *Id.* at 5.
226. Act of Jan. 4, 1975, Pub. L. No. 93-638, 88 Stat. 2206; 25 U.S.C. § 450-458e (1976 Supp.).
227. 25 U.S.C. § 450f (1976 Supp.).
228. *Id.* at § 450h.
229. *Id.* at § 450b(b).
230. *Id.* at § 450b(c).
231. *Id.* at § 450f(a).
232. See 25 U.S.C. § 455-456 (1976 Supp.).

sion) schools.[233] Special funds for construction and renovation of such schools are also available.[234] The latter provisions are further incentives for Native communities in Alaska to assume control of their schools where they are now denominational schools.

States and individual school districts near Indian lands are eligible for funds (at least 75 percent of the total authorized) to construct or renovate schools for Indians.[235] Before entering into any such contracts for construction of Indian schools, the Secretary must consult with the Indian education committee and relevant tribal governing bodies except where the school board is Indian controlled.[236] Assistance in constructing and renovating schools in Indian communities should aid the process of transferring schools from BIA to state or district operation, as well as in promoting decentralization and the concept of community-based schools.

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233. 25 U.S.C. § 458d (1976 Supp.).
234. *Id.* at § 458(c).
235. *Id.* at § 458(b).
236. *Id.* at § 458(e).

Chapter III

Localizing Education and Its Control

As education has spread to children in the most remote parts of the bush, Alaska Natives and educators alike have realized that the fact of education alone is no panacea. Indeed, recent history has shown that the staggering financial costs of Native education in Alaska may be matched by costs more difficult to measure: social and psychological damage, breakdown of family structure, and culture loss.

An appreciation that the social organization and culture of bush Alaska are as fragile as its rugged-appearing, but easily disturbed, environment is a new phenomenon. Superimposition of an education system that works in New York or Kansas may be more than ineffective: it can be damaging. Just as bulldozer tracks will turn into permanent gullies in tundra rather than disappear with a few seasons, the effects of an ill-conceived education system can cut deeply and irreparably into the core of Native life.

The existence of cultural difference was perceived by early educators, but their missionary zeal blinded them to the negative influences of some aspects of western education. However, some were able to adapt their approach to local needs because they were closer to the people they came to serve than to the structure under which they nominally operated. Then government assumed functions once performed by religious orders, and bureaucracy eventually overwhelmed individuality. Altruism was diluted, if not lost, as a motive. Certainly there have always been perceptive non-Native educators. But often it was futile for them to raise a distant voice against a powerful, impersonal government.

The outcry for rural Alaskans to gain control of their education has been primarily their own. By the 1950's, some of the negative fallout from an alien education system was apparent. A generation of Natives which was "fortunate" enough to have had many of its number 'educated" protested a continuation of the same system for their children. For years, forward-looking educators had warned against perpetuating a culturally irrelevant system of Native education.[237] Their unheeded advice has become wisdom.

A. Growing Opposition to Boarding Programs

Disruption of rural Alaska community life has been traced in part to the influence of the school. Education often required much of a village's youth to be taken away for months at a time. On their return, they neither knew the survival skills which for centuries had made possible the existence of their families and ancestors; nor did they care to. Disrespect for family and culture was spawned. Young people were educated, but they were ill-suited for most of the opportunities available to them.

The boarding school syndrome was one of the first principal objects of Native ire, and it still is. Indeed, a substantial change in policy with respect to boarding high schools can be attributed largely to the strength and effectiveness of Native opposition. A meeting with the Alaska congressional delegation in Sitka in late 1968 was the turning point. Protests against perpetuating boarding high schools were forcefully raised by Natives in attendance. A change in philosophy resulted.[238]

The state (and the BIA, consistent with its commitment to coordinate directions in education) had been pursuing a concept of establishing large regional school complexes as recommended in a 1967 study by a Virginia consulting firm.[239] The concept of regional schools was not entirely new; it had been embodied in the "Overall Education Plan for Rural Alaska,"[240] and was reflected in the 1962 BIA State Memorandum of Agreement.[241] The overall plan had recommended regional schools as the least disruptive of rural home and community life, consistent with furnishing a sound education. It was based on two major policy considerations: (1) the need to preserve home ties, and (2) the need to establish schools of adequate size to offer a full program.[242] Relatively small regional schools were seen as a step closer to home than were distant BIA boarding schools. By contrast, the 1967 study proceeded on assumptions derived primarily from experiences outside Alaska: A high school must have a minimum enrollment of 500 to have an adequate curriculum, and there must be integration of students of different racial and socioeconomic backgrounds to avoid the negative effects of segregation. These assumptions were contrary to practice and policy in Alaska, which had been to provide local high schools regardless of their small size.[243] Furthermore, the consultants

237. See C. Ray, A Program of Education for Alaska Natives (1959); See also Summary of recommendations in this regard in Darnell, *supra* at 239, Cf., L. Meriam, The Problems of Indian Administration (1928).

238. Ray, *supra* at 15.

239. Training Corporation of America State of Alaska Regional Secondary School System: Implementation Plan (Feb. 3, 1967) (mimeo.) (hereinafter cited as TCA Study).

240. Ray, *supra* (Appendix E) at 78-101. See text accompanying note 106, *supra*.

241. *Id.* (Appendix C) at 106-07. See text accompanying note 77, *supra*.

242. *Id.* (Appendix E) at 86.

243. The TCA Study itself showed that in 1966 there were 43 BIA or public schools in Alaska (excluding on-base schools) with less than 500 students; only seven had 500 or more. TCA Study, *supra* at I-4a-4b.

failed to consider or comprehend adequately what would be entailed for Alaska Natives to attend school so that those assumptions could be satisfied. There necessarily would be interference with family, culture, and individual student psyches as a result of transplanting adolescents in foster homes for long periods.

A recent study of the effects of boarding programs on Native children and their families documented long-held complaints and reinforced the dissatisfaction of Natives with the system.[244] The adolescent period is critical in the development of identity formation.[245] Boarding programs were shown to have had an adverse influence on Native children during this stage of their lives. Many students in boarding schools developed severe emotional and social problems, turning to drinking, violence, vandalism, and even suicide attempts.[246] The strains on Native children away from home have led to large numbers dropping out of school.[247] Children who have been removed from their communities do not fit readily back into them upon their return.

> When [the Native student] returns to his village each summer, he finds only vestiges of his formerly comfortable family relationship, and he encounters increasing frustrations because of the differences between himself and his village. His exposure to western education has taught him to respect (though not necessarily to understand) western standards, and at the same time it has decreased his respect for the Native culture. He finds himself, figuratively with a foot in each culture, unable fully to identify with either group and accepted by neither as well.[248]

The unpopular policy favoring large regional high schools attended by children from small, rural villages living in dormitories or private foster homes eventually was repudiated. But it took a while for practice to catch up with policy. The Beltz Regional Boarding School in Nome had been in operation since 1966. Similar schools were being built and eventually opened in Kodiak (1968) and Bethel (1972).[249] The state had boarding home programs in Anchorage, Fairbanks, and several of the principal rural communities. And BIA had been operating a boarding high school at Mt. Edgecumbe near Sitka since 1947. As demands exceeded the capacity of Mt. Edgecumbe, Native students were sent to the BIA's Chemawa School in Oregon and Chilocco in Oklahoma.

The Bureau of Indian Affairs was aware that Natives were concerned about the deleterious effects of transporting children to the distant schools. For that reason, efforts were made to curtail the practice, while local BIA school programs expanded to add higher grades and a few state high schools were established in villages. The main alternatives to BIA boarding schools were usually state-run boarding schools or schools connected with the boarding home program. Ironically, the BIA paid for the state boarding program via a Johnson O'Malley contract.[250] For some reason, BIA's negative experiences with high school boarding situations was not perceived as transferable to the state program.

There was considerable anxiety in many villages over the continuation of the supposedly repudiated boarding programs. Children in a large number of villages, reluctant to pay the price of being removed from their families and homes for long periods to attend a boarding school or boarding home program, simply received no secondary education. Because of their distance from existing facilities they were exempt from the state's compulsory attendance laws.[251] A rarely utilized option was correspondence study conducted by the state.[252] No child was categorically denied a high school education. In fact, rural children had available the option of attending a regular high school with all expenses paid including room and board. But many had no real alternative to sacrificing family relations, social solidarity, and cultural integrity to get such an education.

The strong Native sentiment for local schools was bolstered by a judgment of the state legislature. A 1966 law said that while arrangements between one school district and another district, the state, or BIA might be necessary to provide "more efficient or more economical educational services," whenever such an

> arrangement requires pupils to live away from their usual homes, the school board shall provide classes within the district for any grade represented by more than three elementary pupils or five secondary pupils.[253]

The statute was amended in 1974 to require "classes within the attendance area when there are at least eight children eligible to attend elementary and sec-

244. J. Kleinfeld, A Long Way From Home (1973) (hereinafter cited as Kleinfeld).

245. E. Erickson, Childhood and Society 261-62 (1963); J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 19 (1973).

246. Kleinfeld, *supra* at 34.

247. Kleinfeld, *supra*, Appendix II & III. Approximately two thirds of the students surveyed by this study in the boarding home program and one third of those in boarding schools dropped out.

248. Salisbury, *Teaching English to Alaska Natives*, 6 J. Am. Indian Educ. 1, 6 (1967). *See also* Bergman, Boarding Schools and the Psychological Problems of Indian Children, paper presented at Annual Meeting of American Academy of Pediatrics, Indian Health Committee (1967).

249. Ray, *supra* at 15.

250. *See* text following note 141, *supra*.

251. Alaska Stat. § 14.30.010(b)(7) (1975).

252. 4 Alaska Adm. C. § 33.030. Between 1959 and 1972 only 41 students received high school diplomas from the correspondence program. Only a few of them had spent two years or more in correspondence study. Deposition of Margaret Justice, June 8, 1973, Hootch v. State-Operated School System, *supra*.

253. Ch. 9, § 1. [1966] Sess. Laws of Alaska.

ondary school."[254] While the section only applies to the cooperative arrangement situation, it manifested a legislative determination as to the threshold number of children for operating a school,[255] specifically demanding establishment of such schools as an alternative to removal of children from their homes in such circumstances.

Five ninth-grade students from the village of Kivalina sued the state in 1971 to compel provision of a secondary school in their village.[256] The suit was settled with a resolution of the issue as to that village. The Kivalina elementary school expanded to include 12 grades. As a part of the settlement, the state promulgated a regulation in 1971 stating that "[e]very child of school age shall have the right to a secondary education in his community of residence . . . ."[257] At the same time, minimum standards for offering secondary education were adopted in the form of a regulation. The standards described the type of programs to be established, reiterated that there is a right to an education in a child's community of residence, and added: "No child of school age shall be required to live away from his usual home in order to obtain an education."[258] The regulations were straightforward statements of policy, but many Natives were displeased with the failure of the state to implement them.

B. The *Hootch* Litigation

In 1972 a number of children commenced another suit asking the court to require the state to carry out what the regulations said and order establishment of high schools in their communities.[259] The children lived in several villages throughout the state where they were unable to attend high school on a daily basis. Some had never attended school beyond the grades offered in their home communities; others had attended boarding schools but dropped out; some were still in such schools.[260] The state admitted in the suit that there were no programs or facilities in 108 communities and pointed out that such programs were to begin in 17 communities in 1974.[261]

The suit (the Hootch case) charged that the state was not abiding by its own rules, but more significantly, that it was denying secondary school age children their rights under the state constitution which requires the legislature to "maintain a system of public schools open to all children of the state,"[262] and that the denial deprives them of equal protection of the law. The state did not argue that it would be unwise to provide community schools or that it did not want to do so. Indeed, it offered evidence that it was moving in that very direction but argued that it was not compelled to do so by the state constitution. The plantiffs' motion for summary judgment was denied, and thereafter, summary judgment was granted for the state defendants as to the claims under the state constitutional provision. An appeal was taken to the state supreme court. The supreme court found that the phrase "open to all" did not require that schools must be constructed and operate in every village.

> It seems likely that the drafters of the constitution had in mind the vast expanses of Alaska, its many isolated small communities which lack effective transportation and communication systems, and the diverse culture and heritage of its citizens . . . . Thus, in Art, VII, § 1, the Alaska Constitution appears to contemplate different types of educational opportunities including boarding, correspondence, and other programs without requiring that all options be available to all students.[263]

The issue of the state's obligation under the board of education's regulations was also raised. The Superior Court had found the "community of residence" language ambiguous, but interpreted it to mean that a child living within the state-operated school district would have a right merely to attend school somewhere in the unorganized borough—most of the rural part of the state. In line with this interpretation the State Board of Education repealed the regulations and replaced them with ones which stated the right of children to an education in their "district of residence."[264] It is clear that the change in the regulations was motivated by the lower court ruling.[265] On review, the Supreme Court did not find improper the change in the regulations and thus rejected that ground for the plaintiffs' claim.

The Hootch court did not make any decision on the equal protection claims. Those issues were referred back to the Superior Court. There were impressively strong legal and factual grounds for the plaintiffs' claims.

The United States Constitution forbids a state to deny any person equal protection of the law.[266] Similarly, the Alaska Constitution guarantees all persons "equal rights, opportunities, and protection under the law."[267] The United States Supreme Court

254. Alaska Stat. § 14.14.110 (1975).

255. *See also* Alaska Stat. § 14.14.120(a), indicating that a district may be declared inoperative any year in which enrollment falls below eight.

256. Sage v. State Board of Education, C.A. No. 71-1245 (Third Judicial District, Superior Court of Alaska).

257. 4 Alaska Adm. C. § 06.020 (repealed and reenacted effective July, 1974).

258. 4 Alaska Adm. C. § 06.025(2) (repealed effective July, 1974).

259. Hootch v. Alaska State-Operated School System, No. 72-2450, Alaska Superior Court, Third Judicial District, filed Aug. 15, 1972.

260. Brief for Appellants at 5-6, Hootch v. Alaska State-Operated School System, 536 P. 2d 793 (Alaska, 1975).

261. *Id.* 536 P. 2d at 811.

262. Alaska Const. art. VII, § 1.

263. 536 P. 2d at 803.

264. 4 Alaska Adm. C. § 06.020(a).

265. 536 P. 2d at 806, n. 50.

266. U.S. Const. amend. 14.

267. Alaska Const. art. I, § 1; *See also* art. I, § 3 prohibiting denial of civil or political rights because of race, creed or national origin.

recognized the importance of public education in the leading case of Brown v. Board of Education.[268]

> Today, education is perhaps the most important function of the state and local governments . . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Alaska boarding programs have been used almost entirely for village Native children, and there is ample evidence that in those programs they received an inferior education and experienced a high degree of failure and other problems.[269] Although there is nothing patently unconstitutional about a boarding program, even an inadequate one, the fact that the program operates to the disadvantage of a particular racial group makes it vulnerable to constitutional attack. It is clear that "a law nondiscriminatory on its face may be grossly discriminatory in its operation."[270] And the Supreme Court has held that the equal protection clause bans state-sponsored racial inequality."[271]

The compelling facts of the Hootch case supported a finding that the disadvantages of the boarding home program weighed most heavily upon a racially defined group—Alaska Natives. The State Supreme Court has recognized that the "prestatehood pattern of high school locations"—local high schools for most non-Natives, boarding programs for Natives —"which has been reflected in the current system of secondary education, was generated by the dual school system."[272] And the dual system is a de facto vestige of a de jure segregated scheme created by federal statutes.[273] Given this background and the negative consequences of the system for Native children, there was an ample basis for concluding that an opportunity for an education has not been made available to them on equal terms and that both the state and federal constitutions were offended.

A further constitutional argument supporting the village students' demands for community high schools was that they cannot be required to give up other protected rights as the price of receiving an education. The Court has recognized that certain areas of private conduct, such as family relationships, are shielded from unwarranted governmental interference.[274] Decisions of the Alaska Supreme Court have been even more protective of private conduct and preferences, circumscribing carefully those matters which are beyond state manipulation.[275]

It is well documented that destruction of Native family life is a frequent by-product of the boarding programs. Family relationships are important in any society but are especially vital to the Native Alaskan culture. Native lifestyle in many areas still depends on maintaining a precarious balance with the land, water, and resources upon which Natives depend for subsistence. Families work together much of the year to meet their subsistence needs through hunting, fishing, trapping, gathering, and making use of all parts of the animal, fish, and vegetative products of their harvest. Survival for people in some communities turns upon involvement in these endeavors of as many able people as possible in a tiny, isolated village. This lifestyle has been a "dominant and characteristic way of life for most of the Native communities."[276] This remains true in a large expanse of rural Alaska where Native foods are the foundation of a typical villager's diet.[277] These foods could not readily be replaced with substitute foods because an adequate cash economy simply does not exist in many remote villages. Of course, a cash economy has taken root in some of the more accessible villages.

The integrity of the Native culture, upon which hinges sustenance, family life, and a value system, is threatened by the boarding program. Absent a compelling state interest, state interference with such deeply rooted and important personal matters is of questionable legitimacy.[278] The United States Supreme Court held in Wisconsin v. Yoder[279] that Amish children could not be required to attend public schools because to do so might "undermin[e] the Amish community and religious practice." School attendance would interfere with a distinctive lifestyle and prevent parents from rearing children in the traditional manner, thus destroying the Amish community.

The reasoning of the Yoder Court fits the circumstances of the Hootch case's attack on severance of community ties as the price of a high school education.

> The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals and values contrary to beliefs, and by substantially interfering with . . . integration into the way of life of the Amish faith community at the crucial adolescent

268. 347 U.S. 483, 493 (1954).
269. See, *e.g.*, Kleinfeld, *supra.*
270. Griffin v. Illinois, 351 U.S. 12, 17 n.11 (1956); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).
271. *E.g.*, Evans v. Newton, 382 U.S. 296 (1966).
272. 536 P. 2d at 800.
273. *E.g.*, Stanley v. Illinois, 405 U.S. 645, 651 (1972); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).
274. *E.g.*, Ravin v. State, 537 P. 2d 494 (Alaska 1975) (holding a state law prohibiting private use of marijuana to be an unconstitutional interference with private conduct); Breese v. Smith, 501 P. 2d 159 (Alaska 1972) (holding a school rule forbidding students to wear long hair to be an unwarranted invasion of individual liberties).
275. *Id.*
276. Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land* 87 (1968).
277. *Id.* at 52.
278. *E.g.*, Breese v. Smith, *supra.*
279. 406 U.S. 205, 218 (1972).

> stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.[280]

Yoder, however, involved a readily identifiable religious interest which the Court long has recognized to be protectable.

Although no organized religion is involved, the customs and traditions of Natives are so categorically a part of their lives that they rise almost to the level of religious practices. The extension of the First Amendment argument has not yet been accepted by the Court. However, a lower court in Florida has applied Yoder to prevent application of compulsory attendance laws to an Indian child whose family protested that it would attenuate his cultural and community ties.[281] And the United States Court of Appeals for the Eighth Circuit has ruled that wearing long hair by an Indian prison inmate consistent with tradition is in the nature of a religious practice which is beyond government control.[282]

The Alaska Supreme Court has shown in other contexts its understanding of the peculiar circumstances of rural Native Alaskan life and has varied legal rights and obligations accordingly.[283] There has been a strong tendency to conform state conduct to "such basic values as the preservation of maximum individual choice, protection of minority sentiments, and appreciation for divergent lifestyles."[284] It would not be surprising if the court were to hold that the Native village lifestyle is protected by the Alaska Constitution so that the state cannot demand that it be sacrificed in order for a child to obtain a secondary education.

During the Hootch litigation it was apparent that the legislature and the Department of Education were moving in the direction of the relief requested by the plaintiffs. There was little dispute as to the desirability of local schools, and increased state monies were being made available for their construction. This must have dissuaded the Supreme Court in Hootch from dealing with the equal protection issue on the initial appeal and from otherwise developing relief for the plaintiffs.[285] But the Court said it would not "hesitate to intervene if a violation of the constitutional rights to equal treatment under either the Alaska or United States Constitutions is established."[286]

A recent settlement agreement concluded between the plaintiffs and the state promises to forestall the need for adjudication of the equal protection issues.[287] If all the conditions of the agreement and consent decree are met, the matter will be concluded with no further trial. The settlement is the result of more than a year of negotiations. Largely in response to the plaintiffs' demands, the governor proposed a $20 million bond issue for construction of rural high schools. The legislature approved submission of a $59,290,000 bond issue measure to the voters which would authorize sale of bonds for construction of rural schools.[288] Under the settlement agreement at least $20 million is to be used to build new rural high schools promptly.[289]

The State Board of Education, on May 6, 1976, adopted new regulations concerning establishment of local schools and operation of boarding programs.[290] These regulations will govern to a large extent where proceeds of bonds for rural schools must be spent. They are given muscle by the Hootch settlement agreement. The newly promulgated regulations recite that every school age child has a right to be educated in his local community and that he cannot be required to live away from the community in order to

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280. *Id.*

281. Florida v. Clay, 38-50312, County Judges Court, Collier County, Fla., Order Granting Defendant's Motion to Dismiss dated July 24, 1972.

282. Teterud v. Burns, 522 F. 2d 352 (8th Cir. 1975). *But see* New Rider v. Board of Education, 480 F. 2d 693 (10th Cir. 1973), *cert. denied*, 414 U.S. 1097 (1973), denying first amindment protection to an Indian suspended from school for wearing braids in the traditional fashion. Dissenting from the denial of certiorari Justice Douglas decried the BIA boarding system with its "policy of stripping the Indian child of his cultural heritage and identity." Further, he linked the poor achievement and high dropout rate of Indian children in both BIA and public schools to policies which seek to assimilate and abolish cultural differences in Indian youths. *Id.*, 414 U.S. 1097 (Douglas dissenting).

283. *E.g.*, Aguchak v. Montgomery Ward Co., 520 P. 2d 1352 (Alaska 1974) (special notice requirements in suit against village defendant); Carle v. Carle, 503 P. 2d 1050 (Alaska 1972) (child custody may not turn upon cultural bias against Native village way of life); Alvarado v. State, 486 P. 2d 891 (Alaska 1971) (Native villager defendant entitled to have jurors selected from Native communities because of uniqueness of all aspects of Native life).

284. Breese v. Smith, *supra* at 169.

285. *See* 536 P. 2d at 808-09.

286. *Id.* at 809.

287. Agreement of Settlement, dated September 13, 1976, Tobeluk v. Lind, No. 72-2450, Alaska Superior Court, Third Judicial Dist. The case has a new name as a result of a change of parties.

288. Ch. 131, [1976] Sess. Laws of Alaska. The legislation did not make clear how much was used for high school construction in villages which have no secondary schools, but legislative history indicates an intent that high schools be built in many specific communities. *E.g.*, Chairman's Report on the Committee substitute for S.B. 564, House Finance Committee, Alaska Ninth Legislature, 1976. See also enumeration of several sites in the legislation.

289. Agreement of Settlement, *supra* note 285, p. 19, paragraph 8(a). The bond issue was approved by the voters and planning and construction are underway in a number of villages. The State Department of Education is bound to use its best efforts to secure approval for issuance of another $20,570,000 in bonds, adjusted by an inflationary factor, for building rural secondary schools, which would be submitted to the voters for approval in November, 1978. Any amounts above $20 million from the 1976 bond issue used for rural secondary schools as provided in the settlement agreement may be subtracted from the amount which must be produced by the 1978 issue. The agreement specifies the locations where schools are to be constructed and provides for construction at other unspecified sites where needs are identified. *Id.*, pp. 19-23, paragraphs 8-13.

290. 4 Alaska Adm. C. § 05. Under the settlement agreement, these regulations may not be changed. *Id.*, p. 16, paragraph 1.

obtain an education.[291] Elementary schools must be established in every community with eight or more children available to attend, and high school programs must be established wherever there is an elementary school and any available high school students.[292] The school programs were required to be in operation by September 1, 1976, where there were suitable facilities in the community. Subject to waiver by the commissioner of education, the required schools must be in operation by September 1, 1977, in any event.[293] Only after a properly constituted request that no school be established is received from a community school committee (or if none, the BIA advisory school board or the village or city council), can a school district be relieved of its responsibilities.[294] Every district must provide a free boarding school for all secondary students without daily access to a secondary school and may provide the option of a boarding school program to address the special needs of students.[295] The section requiring boarding schools where there is no daily access should become obsolete as districts comply with the regulations and establish schools in virtually all communities. Provision of boarding schools as supplemental facilities will continue.

Whether or not all the issues raised in the Hootch litigation are resolved by the settlement agreement, there has been significant progress toward development of community high schools in Alaska. The 1976 bond issue incorporated in the settlement was the fourth major issuance of bonds to help finance rural schools in Alaska since just before the Hootch case was commenced.[296] Furthermore, the new regulations provide a solid legal entitlement which it would be hard for the state to deny in the future. If the principles in the regulations are abandoned, the state would be in an embarrassing situation before the court. And the facts which would govern any litigated solution are carefully set forth in the settlement agreement in a manner which strongly supports the plaintiffs' legal position. Thus, if the settlement agreement fails for any reason, it is likely that remedies at least as effective could be expected from the court.

291. 4 Alaska Adm. C. § 05.030.

292. 4 Alaska Adm. C. § 05.040(a) & (b). The settlement agreement includes requirements for informing communities of their rights under these regulations, and sets up a schedule for compliance related to specific communities. Agreement of Settlement, *supra*, note 285, pp. 16-18, paragraphs 3 & 6.

293. 4 Alaska Adm. C. § 05.040(c). Procedures for seeking an extension of time for compliance are found at 4 Alaska Adm. C. § 05.060.

294. 4 Alaska Adm. C. § 05.050.

295. 4 Alaska Adm. C. § 09.050.

296. Ch. 170, [1970] Sess. Laws of Alaska, $20,300,000; Ch. 195 [1972] Sess. Laws of Alaska, $16,000,000; Ch. 142, [1974] Sess. Laws of Alaska, $20,337,000.

C. The North Slope Borough

Perhaps the most obvious and effective means of securing localized education and responsiveness to rural community needs is through a borough or city school district. It is the method created for that purpose by the architects of Alaska's Constitution and government. It has not been used extensively to solve education problems of bush Alaska because local tax bases are usually thin and state funding of school districts, while substantial, is inadequate. The device has been used in one notable case with considerable success.

About the time the Hootch case was filed, Eskimos in the Arctic were in the process of forming a local government which was to include the entire Arctic Slope. They were moved by a lack of state or BIA responsiveness to local educational needs and a strong desire for local control. An adequate tax base was available because of oil exploration and development activity.

> [T]here were no schools in the entire North Slope area with classes above the tenth grade. Outside of Barrow, the highest grade for any school was the eighth grade. Of the five schools operating on the North Slope, three were run by the Bureau of Indian Affairs and two by the state. None was subject to local control.[297]

The meager provision of schools and total absence of secondary facilities for the predominantly Eskimo residents of this gargantuan and hostile Arctic desert seemed to be a problem which lent itself to local solution. The growing tax base resulting from Prudhoe Bay petroleum development made feasible consideration of incorporating a borough. Although there were other reasons, such as protecting the land and game resources on which the people rely for subsistence from imbridled activity by the oil industry, "[t]he lack of a high school in the immense region was perhaps the single greatest impetus to borough development."[298]

Formation of the North Slope Borough to include a 56.5 million-acre area was hotly contested in a lawsuit brought by the oil companies who would foot most of the tax bill (Mobil Oil Corp. v. Local Boundary Commission).[299] The State Supreme Court upheld its creation, however, finding that the Alaska Constitution "favor[s] upholding organization of boroughs."[300] The court acknowledged the importance of local government in establishing and controlling an education system.[301]

The North Slope Borough School District is now the basis for locally controlled, locally based educa-

297. Getches, *The North Slope Borough, Oil, and the Future of Local Government in Alaska*, 3 U.C.L.A.-Alaska L. Rev. 55, 59-60 (1973).

298. *Id.* at 60.

299. 518 P. 2d 92 (Alaska 1974).

300. *Id.* at 99.

301. *Id.* at 102, n. 30.

tion. The district has expanded the education program, and the board is free to shape it consistent with community will. High school facilities are available within the borough so that no child need forego a secondary education as the alternative to a lengthy separation from family and community while attending school in areas hundreds or thousands of miles away. The all-Native school board has input from advisory councils in each of the seven villages it includes.[302]

D. Legislative Reform of State-Operated Schools

The furor over the lack of high schools in many Alaska villages and the unresponsiveness of administrators to community needs should be seen as a part of a larger struggle for local control of education in the state. Many villages apparently felt some of the same impulses for autonomy that moved proponents of statehood. They were, however, at the mercy of the state legislature, which was in a key position to make systemic changes. Displeasure voiced from the politically impotent bush met with little action.

In 1966, the state made a concession aimed at permitting more local direction for rural education. An act of the legislature instituted elective advisory school boards in all communities where state schools were operating.[303] Like their counterparts in the BIA system, the boards had no legal power. Their only "duty" was to "advise and assist the Board of Directors . . . through the local official administering the school." Most of the boards under the Alaska State-Operated School System never functioned effectively. In 1975, some 50 percent of the boards were considered nonfunctional."[305]

The education system for the entire state, outside municipalities (the unorganized borough), had been administered by the State Department of Education. There was not even a statewide policy-making board to address the diverse needs of the area separately from those of the state as a whole. Concern for the clumsy, inefficient system led the legislature to create a state corporation called the Alaska State-Operated School System (ASOSS) in 1970.[307]

ASOSS was a separate quasi-agency charged with responsibility for education throughout the unorganized borough. It was governed by a board of directors appointed by the governor. Six of the nine board members had to be from rural areas, outside boroughs and military reservations.[308] The board was delegated some of the authority which formerly had been exercised by the legislature and the State Board of Education, although the exact relationship between the state and ASOSS board was never clear. Administration of rural schools became separate from the State Department of Education's many other duties. Administrative matters still had to be funnelled through the State Department of Administration, however.

The conception of an entity whose sole responsibility was delivery of education in the unorganized borough may have appeared to be a wise move. At the least it would enable a policy-making board and full-time administrators to focus exclusively on that task. But the fundamental impediment of no localized decision making continued. There was not even a procedure for getting input to the board of directors from advisory school boards.

Because ASOSS was still administering an unwieldly system, great improvement was not forthcoming, nor could it have been expected. The capability of ASOSS for effecting change was severely limited because of its behemoth service area with distant clusters of population and a variety of conditions.

Individualized attention was needed for each of the more than 130 schools served by ASOSS but was out of the question. Native leaders saw little difference in rural education in the state system as viewed from the receiving end; they remained essentially disenfranchised in education matters. They urged that the only solution would be decentralization of control.

Energies of Native leaders had been concentrated heavily upon the issue of resolving their claims to land and other rights in the years prior to 1972. Congress had been considering enactment of legislation that would extinguish those claims. It had been prodded not just by Natives seeking justice and a settlement of claims that had been preserved since the purchase of Alaska from Russia, but by oil companies needing to clear land titles in order to get permits to build an 800-mile pipeline which would bisect the state.[309]

On December 18, 1971, the Alaska Native Claims Settlement Act was signed into law.[310] The complicated act left much to be done by Natives—formation of 12 regional corporations and more than 165 village corporations, selection of 80 million acres to be held by the corporations, and more. But its passage freed some Native leaders so that they could concentrate on matters at home with new vigor. Their

302. Interview with Dr. John Anttonen, Superintendent, North Slope Borough School District, January 19, 1976.

303. Ch. 98, [1966] Sess. Laws of Alaska; Alaska Stat. § 14.14.170 (revised and reenacted in 1975).

304. *Id.* at § 1; Alaska Stat. § 14.14.200 (revised and reenacted in 1975).

305. Alaska State-Operated School System, FY 1975 Budget Submission, Analytic Statement, 00808 (Nov. 15, 1973).

306. In 1965 the department had been reorganized to establish a separate Division of State-Operated Schools. *Report of the Alaska Commissioner of Education, 1965*, 23. Any change in delivery of rural education was imperceptible.

307. Ch. 46, [1970] Sess. Laws of Alaska.

308. *Id., as amended,* § 1, Ch. 199, [1972] Sess. Laws of Alaska. Formerly there were seven members, four from rural areas.

309. See generally, M. Berry, The Alaska Pipeline (1975).

310. 43 U.S.C. § 1601 *et seq.* (1976 Supp.).

successful experience with Congress added to their confidence and credibility.

The ASOSS board and staff were impressed not only by the increased pressure for local control, but also by the demonstrated need for it. Their suggestions and discussions with the State Department of Education led to a proposal in early 1973 by Commissioner of Education Marshall L. Lind that there be a thorough investigation of alternatives for education in the unorganized borough and development of recommendations.

Lind requested the Center for Northern Educational Research (CNER) at the University of Alaska to coordinate the project.[311] CNER had been established in 1971 to foster improvement of education in Alaska through research, program development, and educational policy analysis.[312] Together with the Alaska Federation of Natives Human Resources Committee and the Alaska Legislative Committee on PreHigher Education, CNER undertook a year-long study. CNER was assisted in the undertaking by its advisory council—a committee of eminent educators, legislators, public officials, and organization leaders, most of whom were Natives. A series of meetings was held to address issues surrounding the matter, including meetings of the CNER advisory council, of the AFN Human Resources Committee, of the council and the Legislative Interim Committee jointly, and a rural input meeting where "grass roots" sentiment was expressed by bush residents. The CNER staff of professionals met with education agencies, regional corporations, and other groups to discuss the problem and the process of attacking it. The staff also compiled materials, presented alternatives for optimizing local control, and generally coordinated efforts.[313]

In December, 1973, a Forum on Education in the Unorganized Borough was held by the CNER consortium. Position papers were presented by persons from throughout the state. After that meeting a report was prepared by CNER staff for the Legislative Interim Committee on PreHigher Education.[314]

During the course of the CNER study two bills were introduced in both houses of the state legislature[315] to decentralize the state-operated schools by establishing educational service areas in the unorganized borough. Neither bill passed, but the plans proffered in them were fodder for discussion. Eight other types of alternatives (e.g., regionalization, status quo, and municipalities) were debated in the CNER inquiry. Each was exhaustively explored, and many participants in the process formed their opinions.

The CNER report found consensus that delivery of educational services in the unorganized borough had not satisfied the consumers' needs, that ASOSS had been a mistake, and that continuation of central policy and decision making was unacceptable because it was inefficient and squelched local leadership. The report concluded that community control best could be attained through formation of local governments. It found that both ASOSS and BIA are peculiar bureaucracies which inhibit improvements in education and stifle democracy among the segment of Alaskan population which they are supposed to serve and that both should be phased out.

The CNER report made numerous detailed recommendations which would convert ASOSS into a transitional agency until areas of the unorganized borough could form into districts. State government would foster the conversion process through an active program of school district development, including public education, assistance, and grants. All schools would be under districts and removed from ASOSS or BIA by 1980. Some communities would be required to incorporate as municipalities. State financing of schools would be studied to appraise its abilities to deal with the recommended changes. Provision would be made for waiver of existing school laws and regulations to allow innovation.[316]

The legislature failed to act on the CNER recommendations during the 1974 session. The Alaska Federation of Natives (AFN) took steps to insure that the recommendations would be acted upon in the next session. When the legislature convened in 1975, several bills were introduced reflecting the CNER and AFN positions.[317] Similar bills were passed in both houses (S.B. 35 and H.B. 24) after considerable lobbying and input from Native groups. The conference version of the bills was signed into law on June 9, 1975.[318]

The act which now is law (S.B. 35) deviates considerably from several of the CNER recommendations, although it heeds others. Basically, S.B. 35 made ASOSS transitional, charting it for dissolution by July 1, 1976. ASOSS was replaced with several regional education attendance areas (REAA), each with elected school boards controlling all but ultimate fiscal decisions.

Perhaps the most remarkable aspect of the legislation is the rapidity with which it had to be implemented. The shape of Alaskan education always has

311. Letter from Dr. Marshall Lind to Dr. Frank Darnell, dated January 8, 1973, included in Center for Northern Educational Research, Delivery of Educational Services to the Unorganized Borough 392-93 (Univ. of Alaska, Aug., 1973).

312. *Resolution Concerning the Establishment of A Center For Northern Education*, University of Alaska Board of Regents, Fairbanks, Feb. 18, 1971.

313. F. Darnell, K. Hecht & J. Orvik, Prehigher Education in the Unorganized Borough: Analysis and Recommendations 9-14 (1974) (hereinafter cited as Darnell, Hecht & Orvik).

314. *Id.*

315. H.B. 192 & S.B. 122, Alaska Eighth Legislature, 1st Sess. (1973).

316. Darnell, Hecht & Orvik, *supra* at 33-53.

317. S.B. 35, S.B. 94, S.B. 136, H.B. 24, Alaska Ninth Legislature, 1st Sess. (1975).

318. Ch. 124, [1975] Sess. Laws of Alaska; Alaska Stat. § 14.08.011 *et seq.* (1975).

depended on the legislative will of the federal and state governments. But never has such radical change been required so quickly. The irony is that because change must occur so suddenly, many things which ought to change will remain the same. The new REAA boards scurried to be functioning by the July 1, 1976 deadline. Some had to retain mediocre ASOSS administrators because time did not permit their replacement. Under these circumstances, little substantive improvement in local school management is predictable.

E. Decentralizing Under S.B. 35

The first major task under S.B. 35 was to determine the boundaries of the REAAs. Hearings were held throughout the state to solicit views from the affected citizens as to the extent of the REAA in which they would be located. The legislation provided that REAA boundaries would follow regional boundaries set under the Alaska Native Claims Settlement Act.[319] The statute appears to authorize division of the unorganized borough into as many REAAs as there are regional corporations, along coterminous lines. But use of regional lines was not intended to be exclusive. This is shown by subsection (b) of the same section, prescribing certain characteristics for REAAs. REAAs must contain an integrated and homogenous socioeconomic, linguistic, and cultural area. Consideration also is given to transportation and communication. Geographic features and existing boundaries are to be used in describing boundaries.[320] Of course, first-class cities and organized boroughs are excluded, as they constitute existing school districts.[321] Taken together, the two subsections suggest that REAA boundaries are to follow, rather than cross, regional corporation boundaries where they contact them and conform to natural or other predetermined boundaries. This is how the State Department of Community and Regional Affairs, which was charged with administering the act in consultation with the State Department of Education, interpreted it in a series of informational meetings in rural areas around the state in July and August, 1975. Later they began implementing it similarly when hearings were held in numerous bush locations regarding proposed boundaries. The result of the hearings was a division of the state into some 21 REAAs.[322]

Within each REAA the voters elect a board of from five to 11 members.[323] To determine the exact number for each REAA, the department of education consulted with communities during the hearings described above. To permit representation of small communities whose voices might be unheard in a large REAA, an area can be divided into school board sections, each with one or more seats on the board.[324] Section lines are drawn based on population distribution, but by adjusting the number of seats on the board, representation for very small communities can be had in most cases, assuring that they will have a resident on the board. Board members are elected at large by all voters of an REAA.[325] It was necessary to have REAA boundaries, numbers of representatives, and sections determined quickly, as elections were scheduled for February, 1976.

In addition to the elected board for each REAA, every community (or military reservation) with a school has a community school committee.[326] Members are elected at regular municipal elections or special elections set by the department of education. As with the old advisory school boards which functioned under the state-operated school system and which are replaced by these committees, duties are loosely defined and powers nonexistent. The statute merely charges them to "review and make recommendations to the board" of the REAA "concerning the curriculum, program, and general operation of the local school."[327] They may, however, be delegated other functions by the school board.

Powers of the regional school boards are not plenary, as are the powers of a district school board. Because of their financial relationship with the department of education and the fact that their only powers are those delegated by the legislature, there are limits on many things which they are able to do. For instance, the REAA boards' operation of schools and decisions to establish new schools or close old ones are all subject to approval by the commissioner of education.[328] Authority with respect to construction is limited in that an REAA may have to rely upon the State Department of Public Works to build schools requested by the REAA using funds appropriated by legislature or to accept and use grants from that department.[329] Whether the REAA or the department uses the money, choice of sites and other important matters rest in the discretion of departmental officials operating under state regulations.

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319. Alaska Stat. § 14.08.031(a) (1975). The statute also uses the word "sub-boundaries" in reference to the regional corporations. It is not clear what this refers to.

320. Alaska Stat. § 14.08.031(b) (1975).

321. Alaska Stat. § 14.12.010 (1975).

322. Originally 20 REAAs were created by the Commissioner of Community and Regional Affairs on November 1, 1975, pursuant to authority in Alaska Stat. § 14.08.031(a). But after a meeting of residents of REAA 17 and the governor, REAA 21 (including Whittier and Tatitlek) was created on November 24, 1975, dividing REAA 17 along the boundary between the Chugach and Ahtna Regional Corporations. Memorandum to REAA file from Michael C. Harper, Deputy Commissioner, Department of Community and Regional Affairs, dated December 3, 1975.

323. Alaska Stat. § 14.08.041 (1975).

324. *Id.* at § 14.08.051.

325. *Id.* at § 14.08.041(d).

326. *Id.* at § 14.14.170.

327. *Id.* at § 14.14.200.

328. *Id. at* § 14.08.101(6).

329. Alaska Stat. § 14.08.101(7), 14.08.161 (1976).

Ownership of all school buildings and land remains in the state; REAAs will have use permits for them.[330]

Because of overriding authority of the commissioner with respect to REAA school operations, it is not clear how significant the enumerated powers of boards are, as the new act is only beginning to be implemented. The extent to which the power to "adopt regulations governing organization, policies and procedures for the operation of the schools"[331] can be exercised free of the commissioner's disapproval authority remains to be determined. Similarly, the board's duty to "develop a philosophy of education, principles and goals for its schools"[332] must be read in light of the commissioner's overriding control of school operations.

Matters of employment, salaries, purchasing, and disbursement of funds are lodged with the REAA boards.[333] All funds for REAAs are furnished by the state legislature. They receive "basic need," as used in computing foundation aid to districts, plus an amount equal to the average per pupil local tax contributions in city and borough districts.[334] Thus, they are relieved of local effort requirements, but the amount they can receive from the state over and above basic need is indirectly determined by city and borough decisions regarding their local tax effort.

It is unclear whether the REAAs can receive and expend voluntary contributions. It is conceivable that a local industry, a village or regional corporation, or an individual would donate funds. The donation could be motivated by sheer beneficence or it could be an inducement to the community not to form a local government which could tax the donor's property. There is no express bar to receiving and using supplemental funds, but the powers of the REAA are delegated to it by the legislature and, therefore, must be construed narrowly. If they extend only to the enumerated powers, use of funds other than those appropriated by the legislature or received under a contract with BIA, the department or some public agency would be unauthorized.[335]

Contracting authority in the statute does enable REAA's to receive Johnson O'Malley funds directly.[336] They also are eligible for assistance under the Indian Education Act. Indeed, they are eligible until 1979 for funding under special provisions for schools which have been local education agencies for less than three years.[337] Funds under the Elementary and Secondary Education Act programs are available also but are administered through the state agency, i.e., the department of education.[338] The REAAs do not receive P.L. 874 impact aid funds directly as districts do.[339] As discussed earlier, a Native-controlled REAA board is eligible to contract with BIA to take over its school operations under provisions of the Indian Self-Determination and Education Assistance Act.[340]

The unmistakable import of S.B. 35 is to vest boards in communities with local management of schools. Management is not synonymous with control, however. Many local objectives can be achieved by selecting the personnel to staff and administer schools. Innovation in operation and curriculum, choice of school locations, and design and condition of facilities are all quite important, too, but are not functions vested solidly in the REAAs. It may be that the commissioner and the department will administer the act to maximize the local control which is possible under it. There is no indication that they will do otherwise, but the specter of state intervention remains. And there is always the possibility that a policy of minimizing involvement in and preemption of local decisions will change, especially as personnel in the department changes.

330. Alaska Stat. § 14.08.151 (1975).
331. *Id.* at § 14.01.101(5).
332. *Id.* at § 14.08.111(2).
333. *Id.* at § 14.08.101(3) & (4); § 14.08.111(3), (4) & (5).
334. *Id.* at § 14.08.121.
335. *Id.* at § 14.08.101(2).
336. See *supra*, Part II C.
337. See *supra*, Part II F.
338. See *supra*, Part II D.
339. See *supra*, Part II A.
340. See *supra*, Part II G, especially text accompanying notes 230-31.

Chapter IV

Surviving the Cures: Prognosis

There was little room for Native input in education under the Russians or in the early mission schools. Natives were fortunate if their community had a government school in territorial days, and unless it was a school for Natives, chances are they would not even be able to attend.[341] So much energy and resources during the first half of the twentieth century were devoted simply to trying to meet the barest of educational needs in rural Alaska that maximizing quality, preserving culture, and making education responsive to local wills were luxuries. This is not to say that these issues were nowhere raised or dealt with; but necessarily they were not foremost.

By the early 1950's when a statehood move was well afoot, talk of "local control" struck a responsive chord with Alaskans who were weary of having their affairs determined by a distant government which had little comprehension of their situation. Inclusion of strong provisions for local autonomy in the state constitution was a manifestation of a desire to wrest control of Alaskan affairs away from the federal government. The constitutional assumption of responsibility for all of Alaska's education, notwithstanding whatever noble motives underlay it, had little practical significance because of the limited financial abilities of the fledgling state.

While state support of education has vastly increased, the proportion of federal aid has increased even more. Of course, all states have enjoyed an infusion of federal assistance during the last two decades. This has cushioned the burdens of rising education costs which fall on property taxpayers in local districts in most states, but in Alaska it has kept a state-run system of education afloat. Because of Alaska's foundation program, however, it has been cheaper at the local level to maintain state responsibility for local schools rather than to have control vested in borough and city school districts as anticipated by the state constitution.

The last decade has seen long-awaited action to remedy the most glaring structural defects in rural Native education. Native sentiments and professional concerns have evoked positive changes. The process also has yielded some perplexing side effects which must be dealt with.

Fulfillment of Native desires for local control of education is now frustrated by two ironic developments. First, there are multiple vehicles for local input via myriad boards and committees which in a small community can dissipate available talent and interest to the point of insignificance. Second, the regional education attendance areas formed under S.B. 35, while allowing far more local control than was possible under the state-operated school system, has sidetracked the movement toward local government. Indeed, the enactment may be fatally flawed by its conflict with the state constitution. Meanwhile, transfer of BIA schools to districts and REAAs may experience an acceleration greater than that with which many Native people are comfortable.

341. See *supra*, Part I A.

A. Community Control: Too Much of It?

Mechanisms for community input into education-related decision making have proliferated in recent years. The citizens of a single small village may be called upon to elect members to an REAA board, a community school committee, a BIA advisory school board, a BIA agency level school board, a Johnson O'Malley Indian Education Committee, an Indian Parent Committee under the Indian Education Act, a Title I Parent Advisory Committee, a Title VII bilingual education Community Advisory Group, and so on. There is provision in the law for the JOM Indian Education Committee to be the same as the Indian Parent Committee. And there need not be an Indian Education Committee if the school board has a majority of Indians (Natives).[342] But the structures of the various committees and boards differ just enough that there can be little other consolidation of functions without statutory and regulatory changes.

The limits of participatory democracy in rural Alaska are being tested. How many people in a village of 50, 100, or even 2,000 people have the interest, abilities, and time to serve as an unpaid board or committee member? Of those, how many are consumed with tasks as board members, officers, or employees of one of the 12 regional or 165 village corporations or with other Native activities? Native people with capabilities and inclinations for school boards and committees are in tremendous demand.

The initial REAA election placed 147 people on 21 school boards and subsequent elections and appointments placed more than 450 people on community school committees.[343] Inevitably many of these people will have to serve on more than one panel. This can dilute their effectiveness in fulfilling their responsibilities. It is unfair to expect anyone, let alone people from rural Alaska, far from resources or technical assistance and often with limited organizational background or formal education, to perform

342. See notes 171-72 *supra*, and accompanying text.

343. Statement by Nathaniel H. Cole, Deputy Commissioner, Alaska Department of Education, to E. Dean Coon, Assistant Director, Center for Northern Educational Research, December 29, 1976.

flawlessly. It is essential that there be appropriate amendment of statutes and regulations, especially those relating to federal programs, to allow consolidation of the "local input" committees. The elimination of the parallel BIA school system would itself eliminate one type of local committee.

Requirements of local committees and boards are well motivated, needed, and can serve essential functions. But it would be a travesty if communities were so burdened by their participation and their efforts spread so thin that local control collapsed of its own weight. It is not enough to build into the structure means for local input; the system must be made workable in light of actual conditions.

B. S.B. 35 — A Constitutional Clash

S.B. 35 was intended to give rural Alaska the voice in education which it was without in the state-operated system. But the legislation stops short of the most logical solution, and indeed impedes it. Municipalities and school districts formed under them indisputably are the most effective vehicles for achieving local control. Mechanisms for establishing them have existed since statehood. The state constitution manifests a strong purpose to divide the state into organized boroughs and cities which would perform education functions locally. To be sure, there have been impediments to this, especially financial ones.

A reasonable way of dealing with the need for local involvement in education while remaining consistent with existing statutes and the state constitution would have been to enact legislation which would remove impediments to, and affirmatively assist, the formation of municipalities. This would be logical as there are existing local government forms which can perform educational services without creating new structures. This was precisely the recommendation of a statewide, year-long study prepared for the Alaska Interim Committee on PreHigher Education and the department of education in 1974. [344] The recommendations surprisingly were not followed.

The new legislation (S.B. 35), while shifting considerable control to communities, still retains much authority at the state level and frustrates the goal of fostering local governments. Instead of attempting to bring rural education into the grand scheme of local government of the Alaska Constitution, a special layer of quasi-government just for education in the unorganized borough is perpetuated. Governance of educational functions is divided geographically, and this is a major improvement. But the maximum degree of local control, available only through the municipal form, is not secured to the communities.

In spite of imperfections in the approach, local people will probably strive hard to make the REAAs work as vehicles of local control. But the movement for maximum local control will be sidetracked in the process. Farther-reaching measures—such as pursuing local government forms—will await the test of S.B. 35. Expectations may be disappointed somewhat, but the new law's presence will diffuse the local control crusade as community leaders try to optimize the new law's efficacy. Beyond a preoccupation with effectuating S.B. 35, there are restraints built into the scheme which will deter municipal formation.

Perhaps the REAAs are the best available devices for consolidating the BIA and state systems, coalescing the various arms of "local control" and staging for eventual creation of autonomous districts. For this to be a reality, the system must be purged of disincentives to the goal.

There is no incentive for an REAA which lacks adequate school facilities to become an independent district, at least until construction needs have been met at state expense. Usually, it would be folly for an area to incorporate as a municipality before fully state-financed construction was completed. School districts receive only limited state aid for construction costs. [345] But if an area in need of school construction is blessed with an especially strong tax base (as the North Slope Borough with its valuable oil exploration activity), it may make sense to assume the local burden of revenue production in exchange for optimizing local control. Otherwise, municipal incorporation becomes an unnecessarily costly enterprise, probably outweighing the benefits of added local control. It should be noted, however, that there is no barrier to the state's assuming the full burden of financing municipal school district construction. [346]

Even at the sacrifice of some autonomy, voters of an REAA might reason that forming a municipality would be too costly relative to the REAA system. The foundation program simply is not as generous in its funding as is the method for financing REAA schools. Until there is provision for full funding of basic need under the foundation program, and until there is assurance that the formula for "basic need" accurately reflects operating costs in the widely disparate areas of the state, formation of municipalities in the unorganized borough, with its frail tax base, will stagnate.

To remove the financial deterrents to the municipal form the state must move toward full financing of educational needs in district schools through the

344. Darnell, Hecht & Orvik, *supra*.

345. Alaska Stat. § 43.18.100 (1974) provides for reimbursement of one half of school construction costs or payments on indebtedness for such costs. Three quarters of the cost of vocational education facilities is paid by the state. Payments are deferred until the year following payments by the district on bonded indebtedness. Alaska Stat. § 43.50.140 earmarks state cigarette tax revenues for school construction.

346. The bond issue authorized by the legislature in 1976 included funding for school construction in a number of school districts. S.B. No. 564, Alaska Ninth Legislature, 2d Sess. (1976). See *supra*. Note 285.

equalizing medium of a revamped foundation program. Meager local tax bases then can be used to finance non-education costs of municipalities. The foundation formula should allow state aid to abate to some extent for wealthier municipalities. Nothing would prevent them from using their wealth to provide optional and enhancing educational services also. A more adequate and reliable state program of construction financing must also be developed. These measures, supplemented by the panoply of federal programs available especially for the rural Native population, can lead to a system of healthy, locally directed schools. Local control does not depend on local revenue, and this can be confirmed in Alaska if but a few hurdles are cleared.

There are open questions as to some of the practicalities once a decision is made to incorporate a city or borough. It is not clear that the state is obligated to transfer all schools it operates to a new municipality. The state attorney general has indicated that on incorporation, "the Department of Education must transfer the school to the local political subdivision so such political subdivision can carry out its function of providing, operating, and maintaining schools."[347] He concluded further that the state would not be authorized "to continue maintaining and insuring such school buildings after formation of a newly organized borough or city."[348] But this transfer is not mandated in any statute.[349]

There are operational problems with any general conclusion as to the existence of an obligation to transfer. It is not unreasonable to expect that new boroughs and cities in the now unorganized borough will coincide with REAA boundaries in many cases. The standards for organized boroughs and legislative guidelines or setting REAA boundaries are similar in most respects.[350] The fact that a borough must raise revenue locally might lead it to exclude nonrevenue-generating territory in an REAA where costly services would have to be furnished. Cities are usually incorporated around single communities in contrast to the generally areawide nature of a borough and are even more likely to exclude parts of an REAA, although they may include all the schools now attended by more children than reside within the incorporated area.

If a borough were established which included less than an entire REAA or parts of more than one REAA and omitted areas where children resided but included the schools, would the state transfer all school facilities to the new municipality?

The Local Boundary Commission has authority to alter boundaries of proposed boroughs and cities before it accepts a petition for incorporation.[351] This power could be used to force coincidence between REAA and municipal boundaries, but only where it is necessary to meet statutory standards for borough incorporation or, in the case of cities, if the proposed boundaries are too restrictive or too expansive for efficient local government. It is regrettable that the legislature did not mandate the setting of REAA boundaries with future incorporation of municipalities in mind and express that goal as their purpose. Supplemental legislation could convert the REAAs into truly transitional instruments, bringing the REAA arrangement into conformity with the spirit of the local government preferences in the state constitution.

Palliatives may set the REAA mechanism on course, but probably cannot redeem it from a most rudimentary defect. The whole system may be tainted with a constitutional infirmity.

The legislation delegating management and control of REAA schools to the respective boards refers to REAAs as "educational service areas."[352] This is language used in the Alaska Statutes and Constitution. The constitution allows borough assemblies to establish service areas for provision of special services[353] and the legislature can do anything for the unorganized borough that the borough assembly can do for an organized borough.[354] The constitution is clear that "[a] new service area shall not be established if, consistent with the purposes of this [local government] article, the new service can be provided by an existing service area, by incorporation as a city, or by annexation to a city."[355] The purpose of the article "is to provide for maximum local self-government with a minimum of local government units."[356]

There is no doubt from the "service area" language that the legislature intended to act pursuant to the constitutional and statutory powers it has with respect to the unorganized borough. The Alaska attorney general several years ago ruled that the legislature could, under these provisions, establish school service areas in the unorganized borough.[357]

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347. 1963 Alaska Op. Atty. Gen. No. 24.

348. *Id.*

349. There is *authority* for the department to make such transfers. Alaska Stat. § 14.07.030(9) (1975).

350. Compare Alaska Stat. § 29.18.030 with § 14.08.031. Each must take account of social, economic, cultural, and geographic features and must consider transportation and communication. The requirement of an economic base sufficient to support local services is required for borough incorporation, but not for a REAA. There is some indication that the legislature understood that new municipalities would not include entire REAAs. Alaska Stat. § 14.17.210 (1975), allowing continued full state funding for REAA schools which become city or borough schools, refers to individual schools and not to REAAs as entities.

351. Alaska Stat. § 29.18.090 & .100 (1972).

352. *Id.* at § 14.08.031.

353. Alaska Const. art. X, § 5.

354. Alaska Const. art. X, § 6.

355. Alaska Const. art. X, § 5. This section has been implemented by Alaska Stat. § 29.03.020 (1972) which states that the legislature can establish service areas and reiterates the limitation to areas where services cannot be provided via incorporation or annexation.

356. Alaska Const. art. X, § 1.

357. 1961 Alaska Op. Atty. Gen. No. 24. A recent opinion letter of the Attorney General indicates that the

The attorney general warned, however, that establishment of such areas would be subject to the restrictive limitations of Art. X, § 5. Thus the establishment of every new service area must be predicated upon a finding that the service cannot be provided by incorporation as a city or by annexation.

It appears that the creation of every REAA which arguably could be incorporated as a first-class city, i.e., "[a] community having 400 or more permanent residents,"[358] is subject to constitutional attack. Similarly, those areas adjacent to incorporated first-class cities and which might be annexed are under a cloud of legal doubt.[359] The Alaska Supreme Court has taken a dim view of legislative acts which do not comport with the intent of the local government sections of the constitution.[360] There is no reason to believe it would look with favor on the REAA scheme in light of its impact and the purpose of the local government article.

How many of the REAAs were lawfully created as educational service areas in the unorganized borough depends on an analysis of each to determine which could have become new cities or could have been included in existing ones. Any estimate would be speculation, but the attorney general in 1961 suggested that because of the constitutional limitation, "school service areas would not be a widely applicable means of school organization for Alaska."[361]

If disgruntled citizens affected by S.B. 35 sue to challenge the creation of a particular REAA, the whole REAA design may fall. If a court found that a particular REAA could not become a city or be annexed simply because the boundary lines had been drawn in in a manner which excluded that possibility, the scheme may be found to be inherently offensive to the constitution. The task of drawing REAA lines was delegated to the State Department of Regional and Community Affairs. To withstand scrutiny the delegation must have been exercised consistent with the constitution. Unless all possible new cities and annexations were carved out of the unorganized borough before service area lines were drawn, the determination of the department of community and regional affairs may be suspect. The very delegation of authority in the act without limitation to the constitutional restraints on service area creation is questionable. A constitutional method would require findings on the matter as REAA lines are drawn and standards for reaching them consistent with the local government article of the constitution.

analysis is one in which he still "fully concur[s]." Letter from Attorney General, by Ronald W. Lorensen, to Robert S. Gates, Alaska Department of Administration, dated March 26, 1976.

358. Alaska Stat. § 29.18.010 (1972).

359. Annexations are subject to the will of the voters of the area to be annexed in most cases. See Alaska Stat. § 29.68.010 (1972).

360. *Cf.* Abrams v. State, 534 P. 2d 91 (Alaska 1975).

361. 1961 Alaska Op. Atty. Gen. No. 24 at 6.

C. The Uncertain Role of the BIA

It has been intimated that the federal government is not legally required to educate Indians and Alaska Natives and consequently could cease serving them at will.[362] It has further been suggested that the absence of treaties with Alaska Natives in which promises of education services are made weakens their claim to such services.[363] As a technical matter, this may be so, but enforceability of treaty obligations is limited because few treaties are specific as to how obligations will be discharged.[364] Treaty promises generally are fulfilled by including Indians of treaty tribes in BIA school programs and in statutory aid programs,[365] such as those under the Johnson O'Malley Act. Courts have recognized great latitude and discretion in the Congress and Executive in determining how obligations to Indians will be carried out.[366] Thus, Indian beneficiaries of a general treaty promise to furnish education would not be in a more advantageous legal position than Alaska Natives or other Native Americans who are without the benefit of such a promise.

The absence of a specifically enforceable duty does not leave the BIA unrestrained in its decision making with respect to Indian education programs. In order to cut off Native Americans from substantive rights in federal programs administered by the BIA for their benefit, the Secretary must give notice and an opportunity to be heard to the public pursuant to the federal Administrative Procedure Act.[367] Because the BIA had led Congress and Natives themselves to believe that its education programs would include Alaska Natives, a sudden curtailment of those programs in Alaska by administrative action would be improper and not in keeping with the "overriding duty of our federal government to deal fairly with Indians wherever located."[368] The "distinctive obligation of trust incumbent upon the government in its dealings" with Indians[369] is as applicable to Alaska

362. *See* Rosenfelt, *Indian Schools and Community Control*, 25 Stan L. Rev. 489, 502 (1973) (hereinafter cited as Rosenfelt).

363. See, *e.g.*, discussion in Ray, *supra* at 3-5 and F. Darnell, *Systems of Education for the Alaskan Native Population*, in Education in the North (Darnell, ed.) 296-97 (1972).

364. Rosenfelt, *supra* at 503.

365. See Wilkinson and Volkman, *Judicial Review of Indian Treaty Abrogation: As Long as Water Flows, or Grass Grows Upon the Earth—How Long a Time is That?* 63 *Calif. L. Rev.* 601, 602, n. 4 (1975); Rosenfelt, *supra* at 503.

366. *E.g.*, National Indian Youth Council v. Bruce, 366 F. Supp. 313, 322 (N.D. Utah 1973), *affirmed* 485 F. 2d 97, 99 (10th Cir. 1973), *cert. denied* 417 U.S. 920 (1974). The lack of specific treaty language likewise has prevented a tribe from recovering damages for failure to provide adequate medical and education services. Gila River Pima-Maricopa Indian Community v. United States, 427 F. 2d 1194 (Ct. Cl. 1970), *cert. denied* 400 U.S. 819 (1970).

367. 5 U.S.C. § 551 *et. seq.* (1970).

368. *E.g.*, Morton v. Ruiz, 415 U.S. 199, 236 (1974).

369. Seminole Nation v. United States, 316 U.S. 286, 296 (1942), cited in Morton v. Ruiz, *supra*, 415 U.S. at 236.

Natives as to other Native Americans.[370] Natives cannot insist on any specific type of education from the federal government, and the state clearly has ultimate responsibility for their education. But it would be beyond the Secretary's authority for him to withdraw services so rapidly that the state could not as a practical matter do its job, leaving Alaska Natives with no means of getting an education.

The enactment of the Alaska Native Claims Settlement Act has the effect of extinguishing all Native claims based on aboriginal title, statute, or treaty and settling those claims "without establishing any permanent racially defined institutions, rights, privileges, or obligations . . . or lengthy wardship or trusteeship."[371] The future of "all Federal programs primarily designed to benefit Native people" is left open. The Secretary was to study the subject and to report back to the Congress with "his recommendations for future management and operation of these programs . . . ."[372] That study has been completed.[373] The Department of the Interior contracted for the study to be done by Robert R. Nathan Associates, Inc., but the report was not intended to, and did not, include policy recommendations. So far the Secretary has not made any recommendations on the subject, although the act required a report and recommendations by December 18, 1974.

What recommendations will flow from the study and what action Congress might take are uncertain. Congress could decide that the new status of Natives after the Settlement Act, Alaska's growing financial ability to carry out its duties to educate all children in the state, and the newly created REAA mechanism signal a reason to pull out of Alaska. It does not appear, however, that there is as yet any move toward terminating federal educational services for Alaska Natives. Indeed, Congress has passed increased funding for BIA schools and Johnson O'Malley aid in Alaska in the years since the act.[374]

While the BIA has no unwavering legal duty to educate Alaska Natives, and the Alaska Native Claims Settlement Act renders uncertain the future of all BIA services in Alaska, there is no likelihood of withdrawal of education services in the near future. Practical, political, and legal impediments will slow the withdrawal. The principal question, then, is how to accommodate BIA policy to serve best Alaska's rural population. In recent years BIA has been committed to aligning its education goals with those of the state and facilitating transfer of its education functions to the state system (including local districts). The transfer policy has been reiterated in public statements for 30 years. The 1962 Memorandum of General Agreement between the BIA and the state manifested this intention. Remarkably, the BIA Area Office in Juneau has terminated the existing agreement and invited the state to reopen negotiations for a new memorandum of agreement on school transfer.[375]

The timing and conditions of transfers have been something of a problem. The state's financial inability to assume full responsibility consistent with its legal obligation has been the main impediment. The state's shortage of revenue is being turned around with the development of petroleum.[376] Community preference for keeping BIA schools has dissuaded the Bureau from some transfers. It takes the position that schools should not be transferred unless there is local assent. The 1962 Memorandum of General Agreement refers to "local participation" in planning the transfer process. Also, the government's current policy is one of self-determination for Indians which supports a requirement of consent.[377] One reason communities favor retention of BIA schools is that several jobs for local people are related to the schools, such as maintenance, cooking, etc. There is fear that fewer jobs will be available if the schools are transferred to the state.

Another barrier to transfer of BIA schools has been the high cost of bringing some of the federal facilities to state standards.[378] A policy statement from the State Department of Education in 1969 indicated that "[no] facilities should be transferred to the state, cities or boroughs unless they meet minimum standards for safety and the program to be offered by the date of the proposed transfer."[379] Such costs can be extremely high, and the state's reluctance to assume them is understandable. On the other hand, the BIA has no legal obligation to transfer its

370. Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); United States v. Berrigan, 2 Alaska 442 (1905); Edwardsen v. Morton 369 F. Supp. 1359 (D.D.C. 1973); Koniag, Inc. v. Kleppe, 405 F. Supp. 1360 (D.D.C. 1975), appeal pending *sub nom.* Salamantof Village Assoc. & Cook Inlet Region, Inc. v. Kleppe, Nos. 76-1325-35 (D.C. Cir.); F. Cohen, handbook of Federal Indian Law 404 (1942). *See generally*, on the trust relationship, Chambers *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213 (1975).

371. 43 U.S.C. § 1601(b) (1976 Supp.).

372. *Id.* § 1601(c).

373. 2(c) Report, *supra*.

374. Budget data indicate the following monies were spent for education in Alaska in the years shown:

	Johnson O'Malley	BIA Schools
FY 1972	$3,505,092	$ 9,368,975
FY 1973	4,600,000	10,581,460
FY 1974	4,500,000	11,476,900

2(c) Report, *supra*, "Indian Education, Federal Schools Program" at 13.

375. Letter from Clarence Antioquia, Area Director, Bureau of Indian Affairs, Juneau, to Honorable Jay S. Hammond, Governor of Alaska, dated January 20, 1977.

376. It has been estimated that severance taxes will account for $4 billion in state revenues by 1985. Study of Title II, *supra* at 271.

377. See, *e.g.*, Statement of Emil Kowalczyk, Assistant Area Director, BIA Juneau Area Office, included in Darnell, Hecht & Orvik, *supra*, Appendix at 37; Lind, SOS/BIA Schools Dissolution (undated, unpublished) at 5; 2(c) Report, *supra* "Education Programs" at 1.

378. 2(c) Report, *supra*, "Indian Education, Federal Schools Program" at 1.

379. Ray, *supra* (Appendix C) at 57.

schools to the state or a school district. The apparent policy of transferring schools without charge when the state or district agrees to operate the schools is a reasonable one. It has the effect of encouraging the state to perform its constitutional duties but is not legally compelled.[380] So long as BIA accedes to state demands that federal schools be renovated to meet state standards before they will be accepted, the state cannot be faulted. But it would be shortsighted to refuse "gifts" of even substandard school buildings from the federal government which can facilitate the state's assumption of its legal duty to provide education for all the state's children.

The establishment of regional education attendance areas under Senate Bill 35 has prompted discussions between BIA and the State Department of Education concerning transfers. It has been agreed that BIA will transfer schools to the state in any communities where REAA boards by resolution agree to operate them.[381] Several REAAs have accepted the invitation, and transfer of a number of BIA schools has been effected.[382] To the extent that consent of an REAA board does not reflect the will of the community this new policy marks a retreat from BIA's earlier insistence on a manifestation of local desire to have schools transferred from BIA to state operation. The BIA objected, however, to a state proposal[383] that suggested REAAs would take over all BIA schools unless the REAA board expressly opposed the transfer.[384]

It is predictable that many communities with BIA schools will adopt a policy of "wait and see" before pushing for transfer of the schools to the state. For those who choose to wait, there will be the advantage of being able to assess the performance of the particular REAA of which they are part.

BIA schools are within REAAs,[385] and voters, regardless of the fact their children may attend a BIA school, are entitled to vote for school board members and community school committees and even to serve on those bodies. Although under the statute voting is to be by "qualified voters of the communities receiving educational services in the entire regional attendance area,"[386] this would not exclude people in a BIA-served community. Because no REAA school is in fact in a community does not mean people there are not "receiving educational services." There is no proviso saying that "services" refers only to those supplied by the REAA. It would be absurd if voters were disenfranchised because BIA gratuitously was doing a job in their community which the state legally is required to do. Furthermore, the absence of an REAA school building does not mean that the community is not served. Services may be available from the REAA in the form of boarding programs, resource centers, or libraries.

Communities with BIA schools can begin to participate in their REAA now. As they perceive that the system is working well, they can determine the best time and conditions for transferring their local school to REAA control. In the meantime, the possibility of seeking state-financed, supplemental services for children being educated by the BIA could be considered. The REAAs have a duty to "provide . . . an educational program for each school age child who is a resident of the district."[387] This implements in the unorganized borough the constitutional mandate requiring the legislature "to establish and maintain a system of public schools open to all children of the state."[388] It is well established that public education must be made available to all children on equal terms.[389]

Given the constitutional duty of the REAAs, they may have to bear the brunt of remedying any deficiencies or inequalities that are shown to exist in BIA schools vis-a-vis REAA schools. For instance, assume that a particular REAA (and schools in the state generally) have a regular program for assisting children with the inability to speak and understand English. Assume that the BIA has no such program. The fact that BIA has elected to maintain a school in a community does not relieve the state of giving children there an equal educational opportunity. It is reasonable, then, to conclude that the state must, at a minimum, assure that there are programs necessary to rectify language deficiencies of children suffering from them.[390] Consequently, an REAA (and the

380. Such transfers in the past were considered unlawful without specific congressional authorization. 29 *Op. Atty. Gen.* 272 (1911). In 1950 Congress enacted a blanket authorization for conveyance of school properties to school authorities (then under the territorial government) whenever the secretary determines that the properties are no longer required for Native school purposes. Act of Aug. 23, 1950, 64 Stat. 470.

381. Letter from Marshall L. Lind, Commissioner, Alaska State Department of Education to Chairman, REAA Board, dated March 5, 1976.

382. E. Dean Coon, Anne E. Just, and Jerry N. Waddell, *School Finance in Alaska Report No. 1: An Overview of Current Issues, Sources and Distribution of Funds for Public Elementary and Secondary Education* (Fairbanks, Alaska: University of Alaska, Center for Northern Educational Research, 1976), p. 5. REAAs and the BIA schools they accepted on or after July 1, 1976 included: Northwest Arctic REAA—Kotzebue (K-12), Kiana (K-12); Lower Yukon Schools REAA—Emmonak (1-8), Hooper Bay (K-9), and Mountain Village (7-8); and Kuspuk Schools REAA—Kalskag and Lower Kalskag (1-8).

383. Memorandum of Agreement, State of Alaska and Bureau of Indian Affairs, Juneau Area Office (proposed), April 15, 1976.

384. Letter to Dr. Marshall Lind, Commissioner of Education, from John A. Moore, Acting Area Director, Juneau Area, Bureau of Indian Affairs, dated April 16, 1976. BIA also objected to provisions for continued federal funding of the schools once under REAA operation, which funding was to phase out over a five-year period.

385. Alaska Stat. § 14.08.031(d) (1975).

386. *Id.* at § 14.08.041(b) & (d).

387. Alaska Stat. § 14.08.111(1).

388. Alaska Const. art. VII, § 1.

389. Brown v. Board of Education, *supra*, 347 U.S. at 493. See discussion *supra* in text accompanying notes 266-71.

390. Compare Lau v. Nichols, 414 U.S. 563 (1974).

state) may have an enforceable duty to assure that all schools under its jurisdiction have programs to prevent children from being deprived of meaningful schooling.

A harder question is whether parents can insist upon having their children educated in a REAA school rather than a BIA school. The outcome if the question were litigated would depend partly on the reason for the parents' objection. If the school were deficient, the remedy probably would not be a court order requiring a second school to be built in a small village where a BIA school already operates. Rather it might be designed to deal with specific deficiencies, such as language disabilities discussed above. On the other hand, if the only available school were a mission school and the objection were based on constitutional grounds, the possibility of an order requiring the state to provide schools for all children "free from sectarian control" would be substantially greater.[391] Furthermore, the state could not claim that education in a religious milieu satisfies its legal obligation in light of the prohibition against establishment of religion in the first amendment to the United States Constitution,[392] which is substantially reiterated in the state constitution.[393]

If courts are faced with questions of whether the state's obligation to provide an education system for all children has been met, they will undoubtedly apply a rule of reasonableness. They will probably find that to the extent BIA schools assure an equal educational opportunity, the state's duty is done. The history of education in the state, the fact that state and the BIA have long had an agreement to cooperate in educating rural Native children, the realities of state finance, and the progress toward transfer of BIA schools to the state and its political subdivisions would all be influential.

Another possibility short of complete abandonment of a community's BIA school exists. Native communities have options for obtaining control of BIA school operations under the Indian Self-Determination and Education Assistance Act.[394] As we have indicated earlier, local communities, via Native corporations or village councils, can contract to take over some or all of the BIA's education functions. With the approval of such tribal groups even a Native-controlled REAA board can contract to run a BIA school with federal money. So far this device has been untried.

391. Alaska Const. art. VII, § 1; U.S. Const. amend. 1.

392. U.S. Const. amend. 1, cl. 1. Dependency of state function upon a religious function has been held to be unconstitutional. *E.g.*, School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

393. Alaska Const. art. 1, § 4.

394. See Part II G, *supra*.

Chapter V

Conclusion

Education for rural Alaska Natives has come along a lengthy and tortuous path. The saga is far from complete, but the willingness to try fresh approaches and the sincerity of those who are shaping policy are encouraging.

The major attempt of the state to decentralize control—S.B. 35—will not fully achieve the goal, but will be a vast improvement over the state-operated school system it replaces. It also should speed up the withdrawal of BIA education functions. The new law raises some serious legal problems because of its inconsistency with Alaska's local government mandate. Prompt legislative attention to this problem is needed. Action before the S.B. 35 system is declared unconstitutional is essential if dislocations and disappointed expectations are to be avoided.

Federal assistance for Native education adds an array of options for bush education. Perhaps the most notable is the contracting mechanism in the Indian Self-Determination and Education Assistance Act. The patchwork of community-based committees, especially for federal programs, must be simplified. Local control should not become a charade which drains the time and energy of Native leadership through innumerable board and committee meetings, and is so dispersed that there is no real power in any one entity. Consolidating functions would ease burdens on Native participants and broaden the effect they can have.

There is reason to be optimistic about the future. The most remarkable phenomenon is that Native people have remained involved and hopeful in a situation which could be expected to evoke cynicism. They continue to work with state and federal officials and to invest their personal and emotional resources in the search for the right education system for bush Alaska. Assuming the good faith efforts of responsible agency personnel and education professionals are sustained, progress toward the goals of optimizing local control and enhancing the quality of rural education compatibly with Native lifestyles and desires can continue.

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